No. 99-1848-CFX Title: Buckhannon Board and Care Home, Inc., et al., Petitioners
v.
West Virginia Department of Health and Human Resources, et al.

Docketed:
May 18, 2000

Court: United States Court of Appeals for the Fourth Circuit

Entry	Date	Proceedings and Orders
	May 15 2000	Petition for writ of certiorari filed. (Response due August 14, 2000)
	Jun 2 2000	Waiver of right of respondent West Virginia Fire Marshal's Office to respond filed.
	Jun 16 2000	Waiver of right of respondents Joan E. Ohl, et al. to respond filed.
	Jun 21 2000	DISTRIBUTED for Conference of September 25, 2000
	Jun 22 2000	Response requested. (Due August 11, 2000)
	Jul 12 2000	Order extending time to file response to petition until August 14, 2000.
	Jul 12 2000	This extension is granted for all respondents.
	Aug 8 2000	Brief of respondent West Virginia Dept. of Health and Human Resources in opposition filed.
	Aug 14 2000	Brief of respondents West Virginia State Fire Commission, et al. in opposition filed.
	Sep 11 2000	Reply brief of petitioners Buckhannon Board and Care Home, Inc., et al. filed.
	Sep 26 2000	Petition GRANTED. The brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, November 13, 2000. The brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, December 13, 2000. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, December 29, 2000. Rule 29.2 does not apply. SET FOR ARGUMENT February 27, 2001. **********
	Nov 13 2000	Brief amici curiae of Friends of the Earth, et al. filed.
	Nov 13 2000	Order extending time to file petitiners' brief on the merits to and including November 20, 2000. Respondents' brief is due on or before December 20, 2000. A reply brief, if any, is due on or before January 5, 2001.
	Nov 17 2000	Joint appendix filed.
	Nov 17 2000	Brief of petitioners Buckhannon Board and Care Home, Inc., et al. filed.
	Nov 20 2000	Brief amici curiae of Public Citizen and American Civil Liberties Union filed.
	Nov 20 2000	Brief amicus curiae of United States filed.
	Nov 21 2000	Writ of certiorari only as to Dorsey Pierce dismissed pursuant to Rule 46.1.
	Dec 19 2000	Brief amicus curiae of Pacific Legal Foundation filed.
	Dec 20 2000	Brief of respondents West Virginia Dept. of Health and Human Resources, et al. filed.

2 pp

No. 99-1848-CFX

Entry	Date	Proceedings and Orders
	Dec 20 2000	Brief amicus curiae of Alliance of Automobile Manufacturers, Inc. filed.
	Dec 20 2000	Brief amici curiae of Maryland, et al. filed.
	Dec 20 2000	Brief amici curiae of National Conference of State Legislatures, et al. filed.
	Dec 20 2000	Brief amici curiae of Los Angeles County, et al. filed.
	Dec 20 2000	Record filed.
	Dec 22 2000	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Jan 2 2001	Response to Solicitor General's motion for leave to participate in oral argument as amicus curiae and for divided argument received.
	Jan 2 2001	Record filed.
	Jan 5 2001	Reply brief of petitioners Buckhannon Board & Care Home,Inc., et al. filed.
	Jan 19 2001	CIRCULATED.
	Jan 22 2001	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.

Supreme Court, U.S.
FILED

No. 99-1848 MAY 15 2000

OFFICE OF THE CLERK

In The Supreme Court of the United States

BUCKHANNON BOARD AND CARE HOME, INC.; THE WEST VIRGINIA RESIDENTIAL BOARD AND CARE HOME ASSOCIATION; DORSEY PIERCE; and on behalf of all others similarly situated,

Petitioners,

v.

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, et al.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Webster J. Arceneaux, III
(WV State Bar I.D. No. 155)
LEWIS, GLASSER, CASEY & ROLLINS, LLP
Suite 700, One Valley Square
Charleston, WV 25301
(304) 345-2000

Counsel for Petitioners

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

65pp

QUESTION PRESENTED

Buckhannon Board and Care Home, Inc., the Residential Board and Care Association, Dorsey Pierce, and a group of similarly situated homes and residents filed a civil action challenging the self-preservation regulations of the Respondents under the Fair Housing Amendments Act of 1988, 42 U.S.C. §§ 3601, *et seq.* and Titles II and III of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12132 and 12182. The civil action was mooted when the West Virginia Legislature repealed the self-preservation regulations. The Petitioners requested their attorney's fees under the "catalyst theory" and they were denied because of the United States Court of Appeals for the Fourth Circuit's *en banc* decision in *S-1 and S-2 v. State Board of Education*, 21 F.3d 49, 51 (4th Cir.)(en banc), *cert.denied*, 513 U.S. 876, 115 S.Ct. 205, 130 L.Ed.2d 135 (1994). The question presented is:

Whether the Fourth Circuit erred in its interpretation of *Farrar v. Hobby*, 506 U.S. 103, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992), in *S-1 and S-2*, in concluding that the "catalyst theory" is no longer available for civil rights plaintiffs to recover attorney's fees, when ten of the other Courts of Appeals continue to apply the "catalyst theory" in these types of cases.

LIST OF PARTIES

In addition to the parties listed in the caption, the following were parties in the Court of Appeals: Joan E. Ohl, Secretary, West Virginia Department of Health and Human Resources; Office of Health Facility Licensure and Certification; John Wilkenson, Director, Office of Health Facility Licensure and Certification; Sandra L. Daubman, Program Manager, Office of Health Facility Licensure and Certification; West Virginia Office of the State Fire Marshal, Walter Smittle, Fire Marshal; Cecil Underwood, in his official capacity as Governor of the State of West Virginia; State of West Virginia; West Virginia State Fire Commission; John Beaty, II, Commissioner; Joseph J. Bostar, III, Commissioner; Randy Breeden, Commissioner; James W. Fife, Commissioner; Francis A. Guffey, II, Commissioner; Daniel Hess, Commissioner; Gregory Alan Lay, Commissioner; David L. Tolliver, Commissioner; Stephen C. Mcbee, Commissioner; Bill L. Spencer, Commissioner; Victor Stallard, Jr., Commissioner; J. D. Waggoner, Commissioner; and, Kenneth Morgan, Commissioner. There are no additional parent or subsidiary companies of the parties listed in the foregoing list.

TABLE OF CONTENTS

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 11

A. An overview of this Court's decisions on the "catalyst theory." 13

B. The Fourth Circuit's *en banc* decision on the "catalyst theory." 16

C. Ten of the other Courts of Appeals hold that the "catalyst theory" is still available in civil rights cases 18

D. The Petitioners are entitled to their attorney's fees under the "catalyst theory.". 22

CONCLUSION 28

APPENDIX

Order on Petition for Rehearing and Rehearing *En Banc* A1

Buckhanon Board and Care, Inc. et al. v. West Virginia Department of Health and Human Resources, et al., *Per Curiam* Opinion, Unpublished No. 99-1424 . . . . . A4

Buckhanon Board and Care, Inc. et al. v. West Virginia Department of Health and Human Resources, et al., District Court Order, January 29, 1999, Unpublished, Civil Action No. 2:96CV106 . . . . . A9

Fair Housing Amendments Act of 1988 Provision *42 USC § 3613* A22

Americans with Disabilities Act of 1990 Provision *42 USC § 12205* A25

TABLE OF AUTHORITIES

FEDERAL CASES

American Council of the Blind v. Romer, 992 F.2d 249 (10th Cir.), *cert. denied*, 510 U.S. 864, 114 S.Ct. 184 (1993) 20

Baumgartner v. Harrisburg Housing Authority, 21 F.3d 541 (3d Cir. 1991) 19

Beard v. Teska, 31 F.3d 942 (10th Cir. 1994) 20

Brown v. Local 58, International Brotherhood of Electrical Workers, 76 F.3d 762 (6th Cir. 1996) 20

Cady v. City of Chicago, 43 F.3d 326 (7th Cir. 1994) . . . 20

Citizens Against Tax Waste v. Westerville City School, 985 F.2d 255 (6th Cir. 1993) 17

Craig v. Gregg County, 988 F.2d 18 (5th Cir. 1993) . . 17,19

Cullens v. Georgia Department of Transportation, 29 F.3d 1489 (11th Cir. 1994) 20

Farrar v. Hobby, 506 U.S. 103,
113 S.Ct. 566, 121, L.Ed.2d 494
(1992) i,11,13,14,17,19-22

Friends of the Earth, Inc. v. Laidlaw
Environmental Services (TOC), Inc.,
__ U.S. __, 120 S.Ct. 693, 145 L.Ed. 2d 610
(2000) 1,11,13,15,22,26

Hewitt v. Helms, 482 U.S. 755,
107 S.Ct. 2672, 96 L.Ed.2d 654 (1987) 13,14

Kilgour v. City of Pasadena,
53 F.3d 1007 (9th Cir. 1995) 20

Little Rock School District v.
Special School District 1, 17 F.3d 260,
(8th Cir. 1994) 20

Marbley v. Bane, 57 F.3d 224 (2nd. Cir. 1995) 14,19

Morris v. City of West Palm Beach,
194 F.3d 1203 (11th Cir. 1999) 20,22,24

Oxford House-A v. City of University City,
87 F.3d 1022 (8th Cir. 1996) 23

Paris v. United States Dept. of Housing
& Urban Development, 988 F.2d 236
(1st Cir. 1993) 17,23

Payne v. Board of Education, Cleveland
City Schools, 88 F.3d 392 (6th Cir. 1996) 19

Pottgen v. Missouri State High School
Activities Association, 103 F.3d 720
(8th Cir. 1997) 23

Roe v. Cheyenne Mountain Conference
Resort, Inc., 124 F.3d 1221
(10th Cir. 1997) 23

State of New Hampshire v. Adams,
159 F.3d 680 (1st Cir. 1998) 18

S-1 and S-2 v. State Board of Education,
21 F.3d 49 (4th Cir.)(en banc), cert.
denied, 513 U.S. 876, 115 S.Ct. 205, 130
L.Ed.2d 135 (1994) i,9-11,13,15,18,22,26-28

S-1 and S-2 v. State Board of Education,
6 F.3d 160 (4th Cir. 1993) 16

Zinn v. Shalala, 35 F.3d 273 (7th Cir. 1994) 20

FEDERAL STATUTES

Federal Fair Housing Amendments Act of 1988 (FHAA),
42 U.S.C. §§ 3601, *et seq.* i,2

42 U.S.C. § 3612(c)(2) 2,23,24

The Americans with Disabilities Act of 1990,
42 U.S.C. §§ 12132, 12182 . . . . . i,2

42 U.S.C. § 12205 2,23

Title VII of the Civil Rights Act of 1964
42 U.S.C. §§ 2000e *et seq.* 23

28 U.S.C. § 1254(1) 2

42 U.S.C. § 1988 23,24

STATE STATUTES

W. Va. Code § 16-5C-2(f) 3

W. Va. Code §§ 16-5H-1 *et seq.* 3,8

W. Va. Code §16-5H-2(f) (now 16-5H-2(j)) 3

STATE REGULATIONS

C.S.R. §§ 64-65-3, 3.14 (now C.S.R.
64-65-3, 3.36) 3

State Fire Code, §§ 87-1-1,*et seq.* 3,8

C.S.R. §§ 87-1-14, 14.7 3

PETITION FOR A WRIT OF CERTIORARI

Buckhannon Board and Care Home, Inc., the Residential Board and Care Association, Dorsey Pierce, and a group of similarly situated homes and residents respectfully petition that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on January 20, 2000, in order to resolve a conflict between the Fourth Circuit, which does not accept the "catalyst theory," and ten remaining Circuits: First, Second, Third, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh, that all continue to allow a party to recover attorney's fees under the "catalyst theory." The Fourth Circuit's decision in this matter further conflicts with this Court's recent decision in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, __ U.S. __, 120 S.Ct. 693, 145 L.Ed. 2d 610 (2000), which implies that the "catalyst theory" remains a viable mechanism to collect attorney's fees in appropriate cases. This Court is now squarely presented with a holding by the Fourth Circuit that attorney's fees are not available under the "catalyst theory" and it should reverse the Fourth Circuit's decision in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is dated January 20, 2000, and it is unpublished (App. A4). The opinion of Chief Judge Frederick P. Stamp, Jr., United States District Court for the Northern District of West Virginia is dated January 29, 1999 and it is also unreported (App. A9).

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on January 20, 2000. A Petition for Rehearing and Petition for Rehearing *En Banc* was denied on February 15, 2000. (App. A1). Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the denial of rehearing.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This civil action was filed under the Fair Housing Amendments Act of 1988 ("FHAA"), 42 U.S.C. §§ 3601, *et seq.* and Titles II and III of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12132 and 12182. The FHAA provides that "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs." 42 U.S.C. § 3613(c)(2) (App. A21). The ADA, 42 U.S.C. § 12205, similarly provides that a "court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee." (App. A24).

STATEMENT OF THE CASE

Buckhannon Board and Care Home, Inc. ("BBCH"), the Residential Board and Care Association, Dorsey Pierce, and a group of similarly situated homes and residents filed a civil action on October 28, 1996, against the West Virginia Department of Health and Human Resources, the Office of Health Facility Licensure and Certification ("OHFLAC"), the State Fire Marshal and the State Fire Commission to challenge Cease and Desist Orders that were issued under regulations that required all persons residing in a Residential Board and Care Home ("RBCH") to be capable of "self-preservation," i.e. to have the ability, without prompting, to evacuate in the event of an imminent danger such as a fire. The Petitioners' Amended Complaint primarily sought to challenge the Cease and Desist Orders and the self-preservation regulations of the State Fire Code and legislation pertaining to OHFLAC, W. Va. Code §§ 16-5C-2(f), 16-5H-2(f) (now 16-5H-2(j)); C.S.R. 64-65-3, 3.14 (now C.S.R. 64-65-3, 3.36); and, 87-1-14, 14.7, on the basis that they were contrary to the intent and purpose of the FHAA and Titles II and III of the ADA.

In 1996, when the administrative record was made, Dorsey Pierce was an alert woman of 102 years and a four year resident of BBCH in Buckhannon, West Virginia. (Stipulation Exhibit 1, 11/15/96 Tr. at p. 69). Pursuant to the regulations, Ms. Pierce was not eligible to continue residing at BBCH because she was not capable of self-preservation. The Respondents issued Cease and Desist Orders which would

require BBCH to shut down and thereby cause Dorsey Pierce and others to move. (*Id.*, Department Exhibits 1 and 2). BBCH had operated three homes in Buckhannon, West Virginia since 1988. (*Id.* at pp. 100, 109). It was the goal of BBCH to provide the residents with a home-like environment that would be more comfortable than living in an institutional setting. (*Id.* at 113). The residents at BBCH did not need any special care such as nursing care, and they were all private pay residents, i.e., no one paid through Medicaid or SSI (*Id.* at p. 111). It is undisputed that BBCH was in compliance with the legal requirements of OHFLAC and the State Fire Code, except for non-compliance with the self-preservation provisions at issue in this case. (*Id.* at 53, 115-16).

The Petitioners suit was filed challenging the Cease and Desist Orders and a Temporary Restraining Order hearing was immediately scheduled before Chief Judge Frederick P. Stamp, Jr. for November 1, 1996. Upon discussion of the matter at the TRO hearing, the parties stipulated to the entry of an Agreed Order that was entered on November 4, 1996, staying the enforcement of the Cease and Desist Orders pending further factual development and briefing of the legal issues.

The issue before the District Court pitted the concept of "aging in place" in a home-like residential setting such as an RBCH, against the fire safety concerns of the State related to non-institutional settings. This was not an issue unique to West Virginia, as it had developed on a national level when the National Fire Protection Association (NFPA) developed its Life

Safety Code in 1985, inserting Chapter 21 to address the fire safety needs of RBCHs. (Stipulation Exhibit 2, Ex. 2). The Petitioners retained the services of several national experts in the area of fire safety at RBCHs, including Dr. Bernard Levin, a former government employee of the National Bureau of Standards who used his background in fire safety and psychology to help develop the first flexible fire safety standards for RBCHs. Dr. Levin testified with regard to the history of self-preservation regulations across the country.

He testified that when he began his work twenty years earlier, all states had self-preservation requirements for RBCHs. (Stipulation Exhibit 6, Levin depo. at p. 62). It was his goal in developing the chapters in the NFPA Life Safety Code on RBCHs to avoid any reference to the concept of self-preservation because:

> We were trying to avoid requiring people to be in an institutional-like setting with its costs and other deficits just because somebody could not be certified as capable as self-preservation, a term which had no definition. (*Id.*).

He further testified that it was his goal, which was latter accepted in the NFPA Life Safety Code in 1985, to adopt a flexible approach to fire safety, that looked to several factors at the RBCH, not just the ability of a resident to evacuate the premises. As Dr. Levin testified, to adopt an equivalent approach to fire safety, that would run across the full spectrum of RBCHs, he focused on an evaluation of the facilities'

capability to evacuate. (*Id.* at 41). The specific idea that he came upon was to categorize all facilities into three categories for evacuation capability as **prompt, slow, and impractical**. Once a facility and its residents were evaluated under these three approaches, the fire safety parameters for that facility could be devised on an individualized basis. Dr. Levin went on to testify, that after he left the government, he performed a survey for the National Institute of Standards and Technology, and that he had determined that a majority of states had now abandoned the concept of self-preservation for RBCHs and adopted the flexible approach he created in the NFPA Life Safety Code. (*Id.* at 64).

State Fire Marshal Smittle testified in his March 11, 1997, deposition that he had been philosophically opposed to the adoption in 1985 of Chapter 21 of the NFPA Life Safety Code, pertaining to RBCHs, and that he had voted against those provisions at the time (Stipulation Exhibit 5, Smittle depo. at pp.23-28). He thought the regulations pertaining to self-preservation were essential in a small rural state like West Virginia (*Id.*). Two assumptions were built into State Fire Marshal Smittle's position on this issue: first, he put his confidence in buildings being made safe rather than relying on people to help evacuate others; and, second, that a resident at an RBCH not capable of self-preservation will be moved to a higher level of care such as an institutional nursing home which will provide a safer environment. (*Id.* at p. 23)

Because of his beliefs, State Fire Marshal Smittle was in a position to dictate that the State of West Virginia would adopt all of the NFPA Life Safety Code provisions, with the exception of the provisions related to RBCHs for a period of eleven years prior to this civil action being filed. This was despite the fact that the NFPA and a majority of States had already abandoned the self-preservation approach for a more individualized approach to fire safety at RBCHs. Somewhat surprisingly, a mere six weeks after his deposition and the depositions of several of the Petitioners' fire safety experts, State Fire Marshal Smittle made a complete reversal from his long held opposition to the provisions in the NFPA Life Safety Code related to RBCHs. He began taking steps to repeal the self-preservation regulations without advising his counsel in this matter, the Petitioners or the Court.

Between State Fire Marshal Smittle's deposition in March, 1997 and January, 1998, the parties completed their discovery and submitted a voluminous stipulated record to the District Court along with their cross-motions for summary judgment. The District Court entered an additional ruling in this matter on February 19, 1998, denying the Respondents' Motion to Dismiss this civil action.

Sometime on or about February 24, 1998, it came to the attention of undersigned counsel that the Respondents had taken steps to repeal the self-preservation regulations. Counsel for the Petitioners advised counsel for the Respondents of this development, of which he was unaware, and this led to Motions

for a Stay and Motions to Dismiss as Moot being filed in March, 1998 and thereafter.

On March 14, 1998, the West Virginia Legislature enacted House Bill 4200, related to amendments to the State Fire Code, §§ 87-1-1,. *et seq*. and Senate Bill 627, related to W.Va. Code §§ 16-5H-1 *et seq*. that resulted in a repeal of the self-preservation provisions challenged in this civil action. On January 29, 1999, Chief Judge Frederick P. Stamp, Jr., with the United States District Court for the Northern District of West Virginia, entered a final order denying the Petitioners' Renewed Motion for Summary Judgment and Motion for Attorney's Fees and granted the Respondents' Motions to Dismiss the case as Moot (App. A9).

The Petitioners' Motion for Attorney's Fees was premised upon the "catalyst theory" and the "bad faith" exception to the American Rule on attorney's fees. The Petitioners stated that they were entitled to their attorney's fees under the "catalyst theory," because the Petitioners' lawsuit challenging the Respondents' policies regarding self-preservation led to the Respondents abolishing these requirements. Thus, the Petitioners obtained the relief that they sought in the first instance: BBCH was allowed to remain open and Dorsey Pierce and others were not required to move out of BBCH. The Petitioners further argued that, based upon the chronology of events in this case, there could be no doubt that the Petitioners caused the Respondents to change their position on self-preservation.

Petitioners specifically pointed to the fact that Respondent State Fire Marshal Smittle had long been philosophically opposed to the provisions in the NFPA Life Safety Code related to RBCHs. The Respondents had therefore vigorously fought the litigation every step of the way, and had never given any prior indication that they were willing to settle or withdraw from their position that the self-preservation regulations were necessary to the State. Finally, the Petitioners argued that they had a bona fide claim for relief in their civil action, that raised significant legal issues from a national perspective under the NFPA Life Safety Code which were actionable under the ADA and the FHAA.

In his Order, (App. A9), Chief Judge Stamp denied the Petitioners' Motion for Attorney's Fees under the "catalyst theory," because of the Fourth Circuit's decision in *S-1 and S-2 v. State Board of Education*, 21 F.3d 49, 51 (4th Cir.)(en banc), *cert. denied*, 513 U.S. 876, 115 S.Ct. 205, 130 L.Ed.2d 135 (1994). He did state however, "[w]ere this argument viable, plaintiffs might prevail on this theory." (App. A17). Chief Judge Stamp also concluded that, while the Petitioners had made a "very strong argument," the conduct of the State Fire Marshall did not "quite rise, or sink" to the level of bad faith to warrant an award under the attorney's fees "bad faith" exception. (App. A19). The District Court further ordered the parties *sua sponte*, to brief the issue of sanctions under Rule 11, Federal Rules of Civil Procedure, as a result of the alleged bad faith conduct of the State Fire Marshall's Office. (App. A19) By Order entered April 22, 1999, Rule 11 sanctions were

imposed upon the State Fire Marshall's office in the amount of $3,252.00. In so holding, the District Court stated:

> This Court finds that as a state agency and an officer of a state agency, defendants should have been aware of the nature of this litigation. Further, because the "self-preservation" requirement was the root of this case, that defendants could not have known that its deletion would affect this litigation is doubtful, at best.

April 22, 1999 Order, at p.6.

An appeal to the United States Court of Appeals for the Fourth Circuit was filed challenging only one portion of Chief Judge Stamp's Order of January 29, 1999, *to wit* his decision that an attorney's fees award to the Petitioners could not be made under the "catalyst theory" based upon the Fourth Circuit's *en banc* decision in *S-1 and S-2*. The three-judge panel of the Fourth Circuit in this case likewise held that it was obligated under circuit precedent to follow the Fourth Circuit's *en banc* decision in *S-1 and S-2* in its *per curiam* opinion of January 20, 2000, denying the Petitioners any relief (App. A4).

A timely Petition for Rehearing and Petition for Rehearing *En Banc* was also denied (App. A1). This Court should now consider the merits of the Petitioners' claim for attorney's fees under the "catalyst theory" in light of the

conflict between the Fourth Circuit, which does not accept the "catalyst theory," and the remaining ten Circuits: First, Second, Third, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh, that all continue to allow a party to recover attorney's fees under the "catalyst theory." The Fourth Circuit's decision in this matter further conflicts with this Court's recent decision in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, __ U.S. __, 120 S.Ct. 693, 145 L.Ed. 2d 610 (2000), which implies that the "catalyst theory" remains a viable mechanism to collect attorney's fees in appropriate cases. This Court is now presented with the perfect opportunity to reverse the Fourth Circuit's opinion that attorney's fees are not available under the "catalyst theory."

REASONS FOR GRANTING THE WRIT

The United States Court of Appeals for the Fourth Circuit decided in its *en banc* decision in *S-1 and S-2* that this Court's decision in *Farrar v. Hobby*, 506 U.S. 103, 113 S.Ct. 566, 121, L.Ed.2d 494 (1992) required it to conclude that the "catalyst theory" was no longer available to civil rights litigants to recover attorney's fees. This Court recently addressed that conclusion in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, __ U.S. __, 120 S.Ct. 693, 145 L.Ed. 2d 610 (2000), wherein this Court reviewed *S-1 and S-2* but held that it was premature to consider reversing that holding in the context of that case. However, this Court did state:

> *Farrar* acknowledged that a civil rights plaintiff awarded nominal damages may be a "prevailing party" under 42 U.S.C. § 1988, 506 U.S., at 112. *The case involved no catalytic effect.* Recognizing that the issue was not presented for this Court's decision in *Farrar*, several Courts of Appeals have expressly concluded that *Farrar* did not repudiate the catalyst theory. See *Marbley v. Bane*, 57 F. 3d 224, 234 (CA2 1995); *Baumgartner v. Harrisburg Housing Authority*, 21 F. 3d 541, 546-550 (CA3 1994); *Zinn v. Shalala*, 35 F. 3d 273, 276 (CA7 1994); *Little Rock School Dist. v. Pulaski County Special Sch. Dist., #1*, 17 F.3d 260, 263, n.2 (CA8 1994); *Kilgour v. Pasadena*, 53 F. 3d 1007, 1010 (CA9 1995); *Beard v. Teska*, 31 F. 3d 942, 951-952 (CA10 1994); *Morris v. West Palm Beach*, 194 F.3d 1203, 1207 (CA11 1999). Other Courts of Appeals have likewise continued to apply the catalyst theory notwithstanding *Farrar*. *Paris v. United States Dept. of Housing and Urban Development*, 988 F. 2d 236, 238 (CA1 1993); *Citizens Against Tax Waste v. Westerville City School*, 985 F. 2d 255, 257 (CA6 1993). (emphasis added).

120 S.Ct. at 711.

The above quoted passage, clearly illustrates that the Fourth Circuit in *S-1 and S-2* incorrectly interpreted this Court's prior decision in *Farrar* and its impact on the "catalyst theory." It further shows that the decision in *S-1 and S-2* is in direct conflict with the decisions of ten other Court of Appeals, which have all independently concluded that the "catalyst theory" remains a viable mechanism for civil rights litigants to recover their attorney's fees. Unlike the decision in *Friends of the Earth, Inc., supra,* where the district court had not ruled upon a motion for attorney's fees, here the issue was presented to the District Court and denied in the first instance based upon the Fourth Circuit's decision in *S-1 and S-2*. This case then presents this Court with the perfect opportunity to review the Fourth Circuit's decision in *S-1 and S-2* and to hold that the "catalyst theory" remains viable for civil rights litigants to recover their attorney's fees in appropriate cases.

A. An overview of this Court's decisions on the "catalyst theory."

This Court discussed the "catalyst theory" in *Hewitt v. Helms*, 482 U.S. 755, 107 S.Ct. 2672, 96 L.Ed.2d 654 (1987):

> It is settled law, of course, that relief need not be judicially decreed in order to justify a fee award under § 1988. A lawsuit sometimes produces voluntary action by the defendant that affords the plaintiff all or some of the relief he sought through judgment, *e.g.*, a monetary

> settlement or a change in conduct that redresses the plaintiff's grievances. When that occurs, the plaintiff is deemed to have prevailed despite the absence of a formal judgment in his favor.

Id., 107 S.Ct. at 2676.

Thus, under the "catalyst theory," a plaintiff must obtain some form of the remedies he or she sought when filing the complaint. Additionally, in order to receive attorney's fees under the "catalyst theory," the plaintiff must establish that his or her lawsuit motivated the conduct of the defendant which mooted the plaintiff's claim for relief. *Id.*, 107 S.Ct. at 2677; *see also Marbley v. Bane*, 57 F.3d 224, 234 (2nd. Cir. 1995).

Following this Court's decision in *Hewitt*, this Court issued its decision in *Farrar v. Hobby*, 506 U.S. 103, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992), holding that a plaintiff who is awarded only nominal damages in a civil rights lawsuit may be a prevailing party. Despite this holding, this Court further affirmed the decision of the Court of Appeals that held that the plaintiffs were not entitled to an award of attorney's fees under the facts of the case. In defining who is a prevailing party, this Court stated:

> Therefore, to qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim. The Plaintiff must obtain an enforceable judgment against the

> defendant from whom fees are sought, *Hewitt, supra*, 482 U.S., at 760, 107 S.Ct. at 2675, or comparable relief through a consent decree or settlement, *Maher v. Gayne*, 448 U.S. 122, 129, 100 S.Ct. 2570, 2574, 65 L.Ed.2d 653 (1980).

Id. 113 S.Ct. at 573.

More recently, this Court had the opportunity in *Friends of the Earth, Inc., supra*, to examine the "catalyst theory" under *Farrar* and the Fourth Circuit's decision in *S-1 and S-2*. Even though this Court did not issue a precedential ruling on the issue of attorney's fees, this Court apparently rejected the Fourth Circuit's conclusion in *S-1 and S-2* that *Farrar* was intended to eliminate the "catalyst theory." Specifically, this Court stated that the *Farrar* case "involved no catalytic effect." 120 S.Ct. at 711. This Court ultimately decided that it was premature for it to decide the issue of attorney's fees under the "catalyst theory" because it "is for the District Court, not this Court, to address in the first instance any request for reimbursement of costs, including fees." *Id.* at 712. The fact that this Court chose to remand the matter in *Friends of the Earth, Inc., supra* to the District Court further suggests that this Court has implicitly, if not explicitly rejected the Fourth Circuit's decision in *S-1 and S-2*.

B. The Fourth Circuit's *en banc* decision on the "catalyst theory."

In *S-1 and S-2 v. State Board of Education*, 6 F.3d 160 (4th Cir. 1993), the Fourth Circuit was confronted with an argument for attorney's fees under the "catalyst theory" immediately after this Court decided *Farrar*. The majority concluded that this Court's decision in *Farrar* had not intended to reverse the long standing and important "catalyst theory" without addressing it "head-on." *Id.* at 166. Fourth Circuit Chief Judge Wilkinson dissented from the majority's opinion, as he stated:

> The language of *Farrar* is plain: "[T]o qualify as a prevailing party . . . [t]he plaintiff must obtain an enforceable judgment . . . or comparable relief through a consent decree or settlement." *Id.* at ___, 113 S.Ct. at 573. "Whatever relief the plaintiff secures must directly benefit him at the time of *the judgment or by the settlement*." *Id.* [emphasis added by dissenting judge]. "*Only* under these circumstances can civil rights litigation effect "the material alteration of the legal relationship of the parties' and thereby transform the plaintiff into a prevailing party." *Id.* [emphasis added by dissenting judge]. "No material alteration of the legal relationship between the parties occurs *until* the plaintiff becomes

> entitled to enforce a judgment, consent decree or settlement against the defendant." *Id.* [emphasis added by dissenting judge].
>
> * * *
>
> There is no way, however, that *Farrar* and a broad "catalyst theory" of attorneys' fees recovery can be reconciled.

Id. 6 F.3d at 168-169.

In his dissenting opinion, Chief Judge Wilkinson criticized the decisions of three other Courts of Appeals that he felt did not properly consider *Farrar*[1] and he added three additional policy reasons why no Court should continue to recognize the "catalyst theory," including:

1) The "catalyst theory" of attorney's fees recovery conflicts with the plain language of § 1988 itself, as only a prevailing party may recover fees, not someone who influences a change in behavior or policy.

---

[1] At footnote two of his dissent, Chief Judge Wilkinson went on to find fault with the three Courts of Appeals that continued to recognize the "catalyst theory" after the Supreme Court's decision in *Farrar*. *See e.g. Paris v. United States Dept. of Housing & Urban Development*, 988 F.2d 236 (1st Cir. 1993); *Citizens Against Tax Waste v. Westerville City School*, 985 F.2d 255 (6th Cir. 1993); and, *Craig v. Gregg County*, 988 F.2d 18 (5th Cir. 1993).

2) The "catalyst theory" engenders confusion and unnecessary litigation because no standard precisely sets forth where a court is to look to determine how a lawsuit and an outcome are connected. *Farrar*'s limitation to three specific outcomes is a more precise rule.

3) The "catalyst theory" results in officials being unwilling to take voluntary action and may provide incentives for frivolous litigation.

Chief Judge Wilkinson's dissent was ultimately upheld as a Petition for Rehearing was filed in *S-1 and S-2*, and the Fourth Circuit issued a *per curiam en banc* decision adopting his dissenting opinion as the majority opinion. *S-1 and S-2 v. State Board of Education*, 21 F.3d 49, 51 (4th Cir.) (*en banc*), *cert. denied*, 513 U.S. 876, 115 S.Ct. 205, 130 L.Ed.2d 135 (1994).

C. Ten of the other Courts of Appeals hold that the "catalyst theory" is still available in civil rights cases.

The other Courts of Appeals that have addressed this issue are uniform in their conclusion that civil rights litigants may recover their attorney's fees under the "catalyst theory." *See e.g., State of New Hampshire v. Adams*, 159 F.3d 680, 685

(1st Cir. 1998); *Marbley v. Bane, supra*;[2] *Baumgartner v. Harrisburg Housing Authority*, 21 F.3d 541, 545-550 (3d Cir. 1991); *Craig v. Gregg County*, 988 F.2d 18, 21 (5th Cir. 1993); *Payne v. Board of Education, Cleveland City Schools*, 88 F.3d

---

[2] The Second Circuit's decision in *Marbley v. Bane, supra*, is often cited by other Courts of Appeals that have considered the language of *Farrar* and whether it nullified the "catalyst theory." The Second Circuit in *Marbley*, at 234, concluded that nothing in *Farrar* invalidated the "catalyst theory" as follows:

> In *Farrar*, the Supreme Court said that "to qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim. The plaintiff must obtain an enforceable judgment against the defendant from who the fees are sought, or comparable relief through a consent decree or settlement. [*Farrar, supra,*] 113 S.Ct. at 573 (citations omitted). That language, however, appears in the segment of the opinion that discusses the particular award in that case: a jury verdict resulting in a final judgment of nominal damages. Earlier in the opinion, the Court noted its "'generous formulation'" under which "'Petitioners may be considered "prevailing parties" for attorney's fees purposes if they succeed on any significant issue in litigation which obtains some of the benefit the parties sought in bringing suit.'" *Id.* at ___, 113 S.Ct. at 572 (citation omitted).

392, 397 (6th Cir. 1996); *Zinn v. Shalala*, 35 F.3d 273, 274 (7th Cir. 1994); *Little Rock School District v. Special School District 1*, 17 F.3d 260, 262-263 (8th Cir. 1994); *Kilgour v. City of Pasadena*, 53 F.3d 1007, 1010 (9th Cir. 1995); *American Council of the Blind v. Romer*, 992 F.2d 249, 250-251 (10th Cir.), *cert. denied*, 510 U.S. 864, 114 S.Ct. 184 (1993); *Cullens v. Georgia. Department of Transportation*, 29 F.3d 1489, 1494-1495 (11th Cir. 1994).

Several Courts of Appeals have specifically rejected the Fourth Circuit's decision in *S-1 and S-2*, upon a finding that it had misread or misinterpreted this Court's holding in *Farrar*. *See e.g. Brown v. Local 58, International Brotherhood of Electrical Workers*, 76 F.3d 762, fn 7 (6th Cir. 1996) (Fourth Circuit's reading of *Farrar* has been rejected by other circuits that have considered the issue); *Kilgour, supra*, at 1010 (*Farrar* not applicable because it involved recovery on the merits and the "catalyst theory" is an alternative theory); *Cady v. City of Chicago*, 43 F.3d 326 (7th Cir. 1994) ("*Farrar* does not preclude the award of fees when plaintiffs attain the relief they seek through defendants' voluntary action"); *Zinn, supra*, at fn 4 (*Hewitt v. Helms* does allow the award of attorney's fees under the "catalyst theory" and *Farrar* does not provide otherwise); *Beard v. Teska*, 31 F.3d 942, 951 (10th Cir. 1994) (All the other circuits that have considered the issue continue to follow the "catalyst theory").

Petitioners highlight the recent decision of the Court of Appeals for the Eleventh Circuit in *Morris v. City of West Palm*

Beach, 194 F.3d 1203 (11th Cir. 1999), for its discussion regarding the continuing viability of the "catalyst theory" after *Farrar* wherein the Court of Appeals stated as follows:

> While no Supreme Court case has ever affirmatively upheld the application of the catalyst test, the catalyst test accords well with long-held notions of prevailing parties. *See Hewitt v. Helms*, 482 U.S. 755, 760- 61, 107 S.Ct. 2672, 2676, 96 L.Ed.2d 654 (1987) ("It is settled law, of course, that relief need not be judicially decreed in order to justify a fee award under § 1988. A lawsuit sometimes produces voluntary action by the defendant that affords the plaintiff all or some of the relief he sought through a judgment-*e.g.*, a monetary settlement or a change in conduct that redresses the plaintiff's grievances. When that occurs, the plaintiff is deemed to have prevailed despite the absence of a formal judgment in his favor."). Additionally, the question before the Court in *Farrar* addressed the *degree* of relief, rather than the *form* of relief, for the plaintiffs in *Farrar* had attained an enforceable judgment of nominal damages. 506 U.S. at 107, 113 S.Ct. at 570. The fact that the majority used broad language in discussing the question before it (i.e., whether an enforceable judgment of nominal damages can justify a fee award under

> § 1988) does not indicate how it would rule on the question of whether a showing that a plaintiff's lawsuit caused the defendant to act to remedy unconstitutional behavior can justify a fee award. *See Marbley*, 57 F.3d at 234; *Baumgartner*, 21 F.3d at 547-48.

194 F.3d at 1207.

This Court in *Friends of the Earth, Inc., supra*, cited to *Morris v. City of West Palm Beach, supra*, and a majority of the other Court of Appeals decisions in apparently concluding that nothing in *Farrar* repudiated the "catalyst theory." This Court is now squarely presented with a holding by the Fourth Circuit that attorney's fees are not available under the "catalyst theory" and it should reverse the Fourth Circuit's holding in this case.

D. The Petitioners are entitled to their attorney's fees under the "catalyst theory."

The Petitioners respectfully request this Court to review the Fourth Circuit's decision in *S-1 and S-2* in light of the decisions of ten other Courts of Appeals that have concluded that the "catalyst theory" remains viable for Plaintiffs to recover their attorney's fees in civil rights cases and this Court's recent decision in *Friends of the Earth, Inc., supra*. Unlike the procedural posture of the case in *Friends of the Earth, Inc., supra*, the attorney's fees issue is ripe for review in this case. The Petitioners moved for Attorney's fees under the "catalyst

theory" and the District Court specifically denied the fees because of the Fourth Circuit's decision in *S-1 and S-2* (App. A9). The District Court did state however, "[w]ere this argument viable, plaintiffs might prevail on this theory." (App. A17).

The Petitioners moved for attorney's fees under the FHAA, which provides that "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs." 42 U.S.C. § 3613(c)(2) (App. A21); and, the ADA, 42 U.S.C. § 12205, which similarly provides that a "court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee." (App. A24). The Courts of Appeals have considered these provisions to be substantially similar to the attorney's fees provisions under Title VII, 42 U.S.C. §§ 2000e, *et seq.* and 42 U.S.C. § 1988. *See e.g. Roe v. Cheyenne Mountain Conference Resort, Inc.*, 124 F.3d 1221, 1232 (10thc Cir. 1997) (Application for attorney's fees arising under 42 U.S.C. § 12205 is treated the same as a claim arising under Title VII or section 1988); *Pottgen v. Missouri State High School Activities Association*, 103 F.3d 720, 723 (8th Cir. 1997) (Application for attorney's fees arising under 42 U.S.C. § 12205 is treated the same as a claim arising under 42 U.S.C. §1988); *Oxford House-A v. City of University City*, 87 F.3d 1022, 1024 (8th Cir. 1996) (Application for attorney's fees arising under 42 U.S.C. § 3613(c)(2) is treated the same as a claim arising under Title VII or section 1988; facts don't support "catalyst theory"); *Paris v. United States Dept. of*

Housing & Urban Development, 988 F.2d 236 (1st Cir. 1993) (Application for attorney's fees arising under 42 U.S.C. § 3613(c)(2) and 42 U.S.C. §1988 was appropriate under the "catalyst theory")

Based upon the existing case law developed under the "catalyst theory," the Petitioners contend that they are entitled to their attorney's fees under the tests commonly used by the Courts of Appeals to award attorney's fees in this context.[3] The first factor commonly considered by a court under the "catalyst theory" is whether there was a material alteration of the legal relationship between the parties. The Petitioners filed suit challenging the Respondents' policies regarding self-preservation as they sought a permanent injunction prohibiting the enforcement of these regulations. The parties initially entered into an Agreed Order staying any enforcement action by the Respondents. The District Court also concluded that the Respondents' Motions to Dismiss should be denied. At some point after the Petitioners presented their expert deposition testimony in this case, the Respondents capitulated on their long standing support of the self-preservation regulations.

---

[3] *See e.g. Morris v. City of West Palm Beach, supra*, for an example of a three part test utilized by the Eleventh Circuit to award attorneys fees under the "catalyst theory." Most courts have employed a similar two or three part test to consider attorney's fees under the "catalyst theory."

The voluntary conduct of the Respondents resulted in amendments to their regulations and legislative provisions by abolishing the requirements of self-preservation. Thus, the relief obtained by the Petitioners was that which they sought in the first instance. Specifically, BBCH was allowed to remain open and Dorsey Pierce and others were not required to move out of BBCH, as first mandated by the Respondents in the Cease and Desist Orders.

A second factor often considered by a court reviewing an application for attorney's fees under the "catalyst theory" is whether there was a causal relationship between the civil action filed by the plaintiffs and the voluntary action of the defendants. When one looks to the surrounding circumstances and the chronology of events in this case there can be no doubt that the Petitioners caused the Respondents to change their position on self-preservation.[4] It is disingenuous at best, for the

---

[4] The Plaintiffs filed their Complaint in this matter on October 28, 1996, and the Defendants contested the Plaintiffs allegations vigorously. On March 11, 1997, Plaintiffs took the depositions of State Fire Marshal Smittle and Deputy Fire Marshal Darl Cross and each of them asserted that they could not eliminate or modify the self-preservation regulation as it was necessary to protect residents of RBCHs, as well the staff and firefighters who serve such residents, from injury by fire. (Stipulation Exhibit 4, Cross Depo. at p. 14, 20-22); (Stipulation Exhibit 5, Smittle Depo. at p. 22-24). Significantly, a mere six weeks after those depositions, the State Fire Marshal's Office took steps to eliminate the self-preservation regulations.

Respondents to suggest that the changes to the State Fire Code, that led to the repeal of the self-preservation regulations, were unrelated to this civil action. State Fire Marshal Smittle had personally thwarted implementation of the RBCH provisions of the NFPA Life Safety Code for over eleven years.

Finally, courts have often looked to the underlying objective merits of the litigant's claims in considering the merits of a request for attorney's fees under the "catalyst theory." There can be no doubt in this case that the Petitioners had a colorable claim with an objective meritoriousness to that claim. The District Court denied the Respondents' Motion to Dismiss, and in the opinion of undersigned counsel, likely would have granted the Petitioners' Motion for Summary Judgment. From the Petitioners' perspective, this case addressed serious issues of life and death, as they developed expert testimony to establish that elderly residents of BBCH could develop transfer trauma and die if they were required to move out of their existing home-like environment and move into the more sterile environment of an institutional setting.

This Court, in its recent decision in *Friends of the Earth, Inc., supra*, states that it "is for the District Court, not this Court, to address in the first instance any request for reimbursement of costs, including fees."120 S.Ct. at 712. The Petitioners presented their Motion for Attorney's Fees to the District Court based upon the facts set forth above and the Motion was denied because of the Fourth Circuit's decision in *S-1 and S-2*. The Petitioners then appealed to the Fourth

Circuit in an attempt to have it reconsider its *en banc* decision, but neither the three judge panel nor the Court as a whole were willing to reconsider their prior decision in *S-1 and S-2*. Therefore, this Court should reverse the decision of the Fourth Circuit and remand this case to Chief Judge Frederick P. Stamp, Jr. with the United States District Court for the Northern District of West Virginia with instructions to make appropriate findings of fact and conclusions of law with regard to the Petitioners' Motion for Attorney's Fees in this case.

CONCLUSION

This Court should grant *certiorari* to review the Fourth Circuit's decision in this matter and in *S-1 and S-2*. This Court should enter a ruling that an award of attorney's fees and costs may be made based upon the facts of this case under the "catalyst theory." This Court should further remand this case to Chief Judge Frederick P. Stamp, Jr. with the United States District Court for the Northern District of West Virginia with instructions that he consider the Petitioners' Motion for Attorney's Fees and for such further relief as this Court deems just.

Respectfully submitted,

Webster J. Arceneaux, III
(WV State Bar I.D. No. 155)
LEWIS, GLASSER, CASEY
& ROLLINS, LLP
Suite 700, One Valley Square
Charleston, West Virginia 25301
(304) 345-2000
Attorney for Petitioners

May 12, 2000

APPENDIX A

APPENDIX

Order on Petition for Rehearing and Rehearing *En Banc* A1

Buckhanon Board and Care, Inc. et al. v. West Virginia Department of Health and Human Resources, et al., *Per Curiam* Opinion, Unpublished No. 99-1424 ..... A4

Buckhanon Board and Care, Inc. et al. v. West Virginia Department of Health and Human Resources, et al., District Court Order, January 29, 1999, Unpublished, Civil Action No. 2:96CV106 ..... A9

Fair Housing Amendments Act of 1988 Provision *42 USC § 3613* A21

Americans with Disabilities Act of 1990 Provision *42 USC § 12205* A24

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
February 15, 2000

NO. 99-1424
CA-96-106-2

BUCKHANNON BOARD AND CARE HOME, INC; THE WEST VIRGINIA RESIDENTIAL BOARD AND CARE HOME ASSOCIATION; DORSEY PIERCE, by her next friend, Lockie J. Marple, and on behalf of all others similarly situated,

Plaintiffs - Appellants,

and

ALMOST HOME, INCORPORATED; DAISY LAYMAN, by her next friend, Faye Byers

Plaintiffs

v.

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES; GRETCHEN O. LEWIS, Secretary, West Virginia Department of Health and Human Resources;

OFFICE OF HEALTH FACILITY LICENSURE AND CERTIFICATION; NANCY TYLER, Director, Office of Health Facility Licensure and Certification; SANDRA L. DAUBMAN, Program Manager, Office of Health Facility Licensure and Certification; WEST VIRGINIA OFFICE OF THE STATE FIRE MARSHAL; WALTER SMITTLE, Fire Marshal; GASTON CAPERTON, in his official capacity as Governor of the State of West Virginia; STATE OF WEST VIRGINIA, WEST VIRGINIA STATE FIRE COMMISSION; JOHN BEATY, II, Commissioner; JOSEPH J. BOSTAR, III, Commissioner; RANDY BREEDEN, Commissioner; JAMES W. FIFE, Commissioner; FRANCIS A. GUFFEY, II, Commissioner; DANIEL HESS, Commissioner; GREGORY ALAN LAY, Commissioner; DAVID L. TOLLIVER, Commissioner; STEPHEN C. MCBEE, Commissioner; BILL L. SPENCER, Commissioner; VICTOR STALLARD, JR., Commissioner; J. D. WAGGONER, Commissioner; KENNETH MORGAN, Commissioner; JOAN E. OIL, Secretary Department of Health and Human Resources; JOHN WILKINSON, Director, Office of Health Facility Licensure and Certification; CECIL H. UNDERWOOD, Governor, State of West Virginia

Defendants - Appellees

WEST VIRGINIA STATE BOARD OF EXAMINERS FOR REGISTERED PROFESSIONAL NURSES; LAURA S. RHODES, Executive Director, West Virginia State Board of Examiners for Registered Professional Nurses

Defendants

- - - - - - - - - - - - - - - - - -

On Petition for Rehearing and Rehearing En Banc

- - - - - - - - - - - - - - - - - -

Appellants' petition for rehearing and rehearing on en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied.

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/ Patricia S. Conner

Clerk

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

BUCKHANNON BOARD AND CARE HOME, INCORPORATED; THE WEST VIRGINIA RESIDENTIAL BOARD AND CARE HOME ASSOCIATION; DORSEY PIERCE, by her next friend, Lockie J. Marple, and on behalf of all others similarly situated,

Plaintiffs-Appellants,

and

ALMOST HOME, INCORPORATED; DAISY LAYMAN, by her next friend, Faye Byers,

Plaintiffs,

v.

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES; GRETCHEN O. LEWIS, Secretary, West Virginia Department of Health and Human Resources; OFFICE OF HEALTH FACILITY LICENSURE AND CERTIFICATION; NANCY TYLER, Director, Office of Health Facility Licensure and Certification; SANDRA L. DAUBMAN, Program Manager, Office of Health Facility Licensure and Certification; WEST VIRGINIA OFFICE OF THE STATE FIRE MARSHAL; WALTER SMITTLE, Fire Marshal; GASTON CAPERTON, in his official capacity as Governor of the

No. 99-1424

State of West Virginia; STATE OF WEST VIRGINIA; WEST VIRGINIA STATE FIRE COMMISSION; JOHN BEATY, II, Commissioner; JOSEPH J. BOST[illegible] Commissioner; RANDY BR[illegible]missioner; JAMES W. FIFE, Commissioner; FRANCIS A. GUFFEY, II, Commissioner; DANIEL HESS, Commissioner; GREGORY ALAN LAY, Commissioner; DAVID L. TOLLIVER, Commissioner; STEPHEN C. MCBEE, Commissioner; BILL L. SPENCER, Commissioner; VICTOR STALLARD, JR., Commissioner; J. D. WAGGONER, Commissioner; KENNETH MORGAN, Commissioner; JOAN E. OHL, Secretary, Department of Health and Human Resources; JOHN WILKENSON, Director, Office of Health Facility Licensure and Certification; CECIL H. UNDERWOOD, Governor, State of West Virginia,

Defendants-Appellees,

and

WEST VIRGINIA STATE BOARD OF EXAMINERS FOR REGISTERED PROFESSIONAL NURSES; LAURA S. RHODES, Executive Director, West Virginia State Board of Examiners for Registered Professional Nurses,

Defendants.

Appeal from the United States District Court
for the Northern District of West Virginia, at Elkins.
Frederick P. Stamp, Jr., Chief District Judge.
(CA-96-106-2)

Argued: December 2, 1999

Decided: January 20, 2000

Before NIEMEYER and MOTZ, Circuit Judges,
and BUTZNER, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Webster J. Arceneaux, III, LEWIS, FRIEDBERG, GLASSER, CASEY & ROLLINS, L.L.P., Charleston, West Virginia, for Appellants. David Paul Cleek, OFFICE OF THE ATTORNEY GENERAL, Charleston, West Virginia; Charlene Ann Vaughan, Deputy Attorney General, WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN SERVICES, Charleston, West Virginia, for Appellees. **ON BRIEF:** Sandra K. Henson, LEWIS, FRIEDBERG, GLASSER, CASEY & ROLLINS, L.L.P., Charleston, West Virginia, for Appellants. Darrell V. McGraw, Jr., Attorney General, Chad M. Cardinal, Assistant Attorney General, Charleston, West Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

BEST AVAILABLE COPY

OPINION

PER CURIAM:

The appellants in this case ask us to reexamine our holding in *S-1 and S-2 v. State Board of Education of North Carolina*, 21 F.3d 49 (4th Cir. 1994) (*en banc*), which rejected the catalyst theory when determining whether to award attorneys fees under federal statutes making fees awardable to prevailing parties. As a three-judge panel of the court, however, we are bound by our precedent. *See Joseph v. Angelone*, 184 F.3d 320, 324-25 (4th Cir. 1999). Accordingly, we affirm the judgment of the district court that relied on *S-1 and S-2* in denying appellants' motion for attorneys fees.

Buckhannon Board and Care Home, Inc. ("Buckhannon"), which operates residential care homes for elderly people who require some assistance in the activities of daily living, failed an inspection by the West Virginia Office of the State Fire Marshal because it housed residents incapable of self-preservation, in violation of West Virginia law. *See* W. Va. Code § 16-5H-2 (1998) (requiring that all residents of residential board and care homes be capable of self-preservation). Buckhannon and other plaintiffs commenced this action for a declaratory judgment that the state law violated the Fair Housing Amendments Act ("FHAA"), 42 U.S.C. § 3601 *et seq.*, and the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.*

While the action was pending, West Virginia amended state law to delete the self-preservation requirement. None of the defendants, however, informed the plaintiffs or the court of the pending amendments. Indeed, the district court noted that the defendants did not even inform their own attorney, who was representing them in this action. As a result of the amendments, this action became moot, and the district court dismissed it.

Although Buckhannon did not obtain the change in state law through an enforceable judgment, consent decree, or settlement, it claimed nevertheless that it was the prevailing party entitled to attorneys fees under the FHAA and the ADA. *See* 42 U.S.C. § 3613(c)(2); 42 U.S.C. § 12205. Buckhannon argued that under a catalyst theory, it obtained the relief it sought through the defendants' voluntary conduct because it filed this action and brought to the state's attention the flaws in its law. The district court observed that if the catalyst theory were available in this circuit, the plaintiffs "might prevail." However, because this circuit had rejected the catalyst theory in *S-1 and S-2*, the district court denied the plaintiffs' motion for attorneys fees.

On this appeal, the appellants challenge "only the district court's ruling on the disallowance of attorneys fees and costs under the 'catalyst theory.'" They urge us to reexamine our decision in *S-1 and S-2*, which, they acknowledge, would, if applied, require rejection of their appeal.

The Fourth Circuit has determined that panels of the court are bound by the prior decisions of the court, *en banc* or in panel, and that binding precedent can be reversed only by the court *en banc*. *See Joseph*, 184 F.3d at 325 ("As a panel, we are not authorized to reconsider an *en banc* holding even if we happen to be so inclined, which we are not"); *Busby v. Crown Supply, Inc.*, 896 F.2d 833, 840-41 (4th Cir. 1990) ("[A] panel considers itself bound by the prior decision of another panel, absent an *in banc* overruling or a superseding contrary decision of the Supreme Court").

In *S-1 and S-2*, we held that in order to qualify as a "prevailing party" in litigation, the plaintiff must, through the litigation, "'obtain an enforceable judgment . . . or comparable relief through a consent decree or settlement.'" *S-1 and S-2 v. State Board of Education of North Carolina*, 6 F.3d 160, 168 (4th Cir. 1993) (Wilkinson, J., dissenting) (quoting *Farrar v. Hobby*, 506 U.S. 103, 111 (1992)), *vacated*, 21 F.3d 49 (1994) (*en banc*) (adopting Judge Wilkinson's dissent as the majority opinion). Because the plaintiffs did not bring about the change in West Virginia law through any judgment, decree, or settlement, we conclude that the district court properly applied *S-1 and S-2* to this case. Accordingly, the judgment of the district court is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

BUCKHANNON BOARD AND CARE HOME, INC; THE WEST VIRGINIA RESIDENTIAL BOARD AND CARE HOME ASSOCIATION; DAISY LAYMAN, by her next friend, FAYE BYERS; DORSEY PIERCE, by her next friend LOCKIE J. MARPLE, and on behalf of all others similarly situated,

Plaintiffs,

v. Civil Action No. 2:96CV106
(STAMP)

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, GRETCHEN O. LEWIS, Secretary; West Virginia Department of Health and Human Resources, OFFICE OF HEALTH FACILITY LICENSURE AND CERTIFICATION, NANCY TYLER, Director, Office of Health Facility Licensure and Certification SANDRA L. DAUBMAN, Program Manager, Office of Health Facility Licensure and Certification; WEST VIRGINIA OFFICE OF THE STATE FIRE MARSHAL, WALTER SMITTLE, Fire Marshal; GASTON CAPERTON, in his official capacity as Governor of the State of West Virginia, STATE OF WEST VIRGINIA , WEST VIRGINIA STATE FIRE COMMISSION, JOHN BEATY, II, Commissioner, JOSEPH J. BOSTAR, III, Commissioner, RANDY

BREEDEN, Commissioner, JAMES W. FIFE, Commissioner, FRANCIS A. GUFFEY, II, Commissioner, DANIEL HESS, Commissioner, GREGORY ALAN LAY, Commissioner, DANIEL L. TOLLIVER, Commissioner, STEPHEN C. MCBEE, Commissioner, BILL L. SPENCER, Commissioner, VICTOR STALLARD, JR., Commissioner, J. D. WAGGONER, Commissioner, KENNETH MORGAN, Commissioner,

Defendants.

MEMORANDUM OPINION AND ORDER GRANTING DEFENDANT WALTER SMITTLE'S MOTION TO DISMISS, GRANTING WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES AND CECIL UNDERWOOD'S MOTION TO DISMISS, DENYING PLAINTIFFS' RENEWED MOTION FOR SUMMARY JUDGMENT, DENYING PLAINTIFF'S MOTION FOR ATTORNEY'S FEES AND DIRECTING DEFENDANTS WALTER SMITTLE, WEST VIRGINIA OFFICE OF THE STATE FIRE MARSHAL AND THE WEST VIRGINIA STATE FIRE COMMISSION TO SHOW CAUSE WHY THEY HAVE NOT VIOLATED RULE 11 OF THE FEDERAL RULES OF CIVIL PROCEDURES

I. Background

Plaintiffs filed this civil action in this Court on October 20, 1996, alleging, in part, violations of the Americans with Disabilities Act ("ADA") and the Fair Housing Amendments Act ("FHAA"). Plaintiffs sought declaratory and injunctive relief in addition to money damages. On January 2, 1998, plaintiffs entered a stipulation by which they relinquished all their claims for money damages, both punitive and compensatory. Consequently, plaintiffs retained claims for prospective relief only. Specifically, plaintiffs asked this Court to declare that West Virginia Code §16-5C-1, *et seq.* and 64 CSR § 65-1, *et seq.* governing residential board and care homes violate the ADA, the FHAA and the United States Constitution to the extent that the law and regulations required all RBCH residents to be capable of "self-preservation." 87 CSR § 1-14-7. In other words, the law required that all RBCH residents be able to remove themselves, physically, from "situations involving imminent danger." *Id.* On March 14, 1998, the West Virginia Legislature enacted Senate Bill 627 which amended the West Virginia Code by deleting the "self-preservation" requirement from RBCH Licensure standards.

Arguing that the amendment to the West Virginia Code mooted this civil action, defendant Walter Smittle ("Smittle") filed a motion to dismiss on May 15, 1998. Similarly, on May 22, 1998, the West Virginia Department of Health and Human Resources ("HHR") and Governor Cecil Underwood

("Underwood")[1] filed a motion to dismiss and renewed motion for summary judgment. HHR and Underwood also argued that the enactment of Senate Bill 627 mooted this civil action. On June 5, 1998, plaintiffs filed a response to both Smittle's motion to dismiss and the motion to dismiss and motion for renewed summary judgment[2] filed by HHR and Underwood. On June 15, 1998, HHR filed a reply in support of its motion to dismiss. Also on June 15, 1998, Smittle filed a reply in support of his motion to dismiss.

On June 5, 1998, plaintiffs filed a renewed motion for summary judgment. No response to this motion was filed.[3]

Also on June 5, 1998, plaintiffs filed a motion for attorney's fees. On June 18, 1998, Smittle filed a response to the motion for attorney's fees. On June 19, 1998, HHR filed a

---

[1] This Court takes judicial notice that Cecil Underwood succeeded Gaston Caperton, who was the Governor of West Virginia at the time this civil action was commenced.

[2] The renewed motion for summary judgment concerned Counts IV, V and VI of the amended complaint. Those counts were dismissed by stipulation on June 11, 1998. Accordingly, this Court will not address those arguments.

[3] However, the arguments raised are addressed by the memoranda filed in conjunction with the above-noted motions to dismiss.

response to the plaintiffs' motion for attorney's fees. On June 30, 1998, plaintiffs filed a reply in support of the motion for attorney's fees.

For the reasons set forth below, this Court finds that defendant Smittle's motion to dismiss and HHR and Underwood's motion to dismiss should be granted, plaintiffs' renewed motion for summary judgment should be denied and plaintiffs' motion for attorney's fees should be denied. Additionally, this Court finds it appropriate to direct defendants Walter Smittle and the West Virginia State Fire Commission to show cause as to why they have not violated Rule 11 of the Federal Rules of Civil Procedure.

II. Discussion

A. Motions to Dismiss

As noted above, defendants HHR, Underwood and Smittle have filed motions to dismiss arguing that this civil action has been rendered moot by the West Virginia Legislature's enactment of Senate Bill 627 which eliminates the term "self-preservation" and the "self-preservation requirement" from the licensure standards for RBCHs. In response, plaintiffs contend that although the "self-preservation" language has been eliminated from the statutes governing RBCHs, this civil action is not moot because new provisions in the state fire code continue to discriminate against RBCH residents on the basis of their disability. Plaintiffs also

argue that because, like statutes, West Virginia regulations are enacted by the legislature and have like effect and because the regulations regarding "self-preservation" have not been repealed, this civil action is not moot. Additionally, plaintiffs argue that the defendant are not following the Life Safety Code adopted by the State despite the mandate in the state fire code that the Life Safety Code shall be followed. For this reason, plaintiffs contend, this civil action is not moot.

Challenges to the validity of legislation that seek only prospective relief are rendered moot if during the pendency of the litigation the legislation is repealed or amended in a significant way so that the allegedly offensive provision ceases to exist. *See e.g. United States Dept. of the Treasury v. Galioto*, 477 U.S. 556, 559-60 (1986) (finding moot challenge to federal firearms statute after Congress amended statute to eliminate allegedly discriminatory provision); *Princeton Univ. v. Schmid*, 455 U.S. 100, 103 (1982) (holding that amendment to regulation renders litigation challenging its validity moot). At the same time, because a "defendant's voluntary cessation of [a] challenged practice does not deprive a federal court of its power to determine the legality of the practice," repeal or amendment of an allegedly impermissible law may not moot a controversy if the legislation was not altered significantly, if a possibility exists that the legislature may reenact the provision, or if relief other than prospective relief was requested. *Northeastern Fla. Chapter of the Assoc. of Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662 & n.3 (1993);

see City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 289 n.10 (1982).

This Court finds that this civil action has been rendered moot by Senate Bill 627 which repealed the "self-preservation" requirement for RBCH residents. As noted above, plaintiffs seek only prospective relief in this civil action. Further, the elimination of the language and the requirement in its entirety is a significant alteration of the statutory scheme, and finally, this Court finds no indication of a possibility that the West Virginia Legislature will reenact a provision similar to the now repealed "self-preservation" requirement.

Plaintiffs' reliance on *Northeastern, supra*, does not compel a different result. In *Northeastern*, the City of Jacksonville repealed a set-aside ordinance after the Supreme Court granted certiorari. However, the next day, the City enacted a similar ordinance. The Court held that the action was not moot, noting that "[t]here is no mere risk that Jacksonville will repeat its allegedly wrongful conduct, it has already done so." 508 U.S. at 662. Similarly, in *Aladdin's Castle*, upon which the *Northeastern* Court relied, the Court held that a challenge to the City's licensing ordinance governing coin-operated amusement establishments was not moot despite the repeal of the ordinance. The Court found that the City could merely reenact the ordinance and noted that it had announced its intention to do so. 455 U.S. at 289 & n.11.

Here, there is no statement from the West Virginia Legislature of an intent to reenact the "self-preservation"

requirement, nor has the State reenacted a provision similar to the "self-preservation requirement." Plaintiffs argue that § 87-1-14.8.19 of the new fire code, which requires those residents who are "impractical to evacuate" to be housed on ground-level floors, constitute a reenactment, in effect, of the "self-preservation" requirement. This Court disagrees. The "self-preservation" requirement forbade RBCHs from housing any individual not capable of physically removing himself or herself to a point of safety when faced with imminent danger. The new regulation contains no such prohibition.

Further, this Court finds plaintiffs' argument with respect to the legislature's failure to repeal the regulations pertaining to "self-preservation" unpersuasive. Regulations implement a governing statute. Without such a statute, a regulation has no force or effect because there is nothing to implement. Similarly, this Court is not persuaded by plaintiffs' argument that the defendants' failure to comply with the adopted Life Safety Code prevents this controversy from being moot. The argument raises an entirely new issue in this litigation and is not related to plaintiffs' current complaint.

Because this Court finds that the repeal of the "self-preservation" requirement is a significant alteration to the statutory scheme and further finds that there is no indication that such a provision will be reenacted, this Court finds that Senate Bill 627, recently enacted by the West Virginia Legislature, renders this civil action moot. For this reason, this Court finds that the motions to dismiss made by the West

Virginia Department of Health and Human Resources and Walter Smittle should be and hereby are GRANTED.

B. Renewed Motion for Summary Judgment

Because this Court has found that this civil action is moot, plaintiffs' renewed motion for summary judgment should be and hereby is DENIED.

C. Motion for Attorney's Fees

Plaintiffs make two arguments in support of their motion for attorney's fees: (1) plaintiffs are prevailing parties entitled to an award of such fees or (2) the bad faith doctrine entitles plaintiffs to such fees. First, plaintiffs argue that under the "catalyst theory," they are prevailing parties and are entitled to attorney's fees pursuant to provisions in the ADA and the FHAA. The "catalyst theory" deems a plaintiff to have prevailed when he or she obtains some portion of the relief originally sought through a defendant's voluntary conduct, even though no formal judgment in his or her favor has been rendered. Were this argument viable, plaintiffs might prevail on this theory. However, the United States Court of Appeals for the Fourth Circuit has rejected the "catalyst theory." *S-1 and S-2 v. State Board of Educ. of North Carolina*, 21 F.3d 49, 51 (4th Cir. 1994). Plaintiffs argue that this Court should not follow this holding. Instead, plaintiffs assert, this Court should follow Third Circuit precedent, which permits parties to avail

themselves of the "catalyst theory." This Court finds that such action would be wholly improper.

Second, plaintiffs argue that this Court should invoke its inherent power to award attorney's fees premised upon defendant Smittle and the Fire Commission's alleged bad faith. Plaintiffs note that approximately six weeks after they took defendant Smittle's deposition in this matter, during which he defended the "self-preservation" requirement as a valid exercise of the State's policy power, Smittle took action to get the Fire Code amended and proposed changes that would eliminate the "self-preservation" requirement. Furthermore, plaintiffs assert, these defendants saw the proposed amendments through their adoption and promulgation by the West Virginia Legislature in House Bill 4200. At no time did they inform plaintiffs, this Court, or even their own attorney that these changes were being sought and were successfully progressing through the adoption process. Plaintiffs contend that had they so informed them, or even their own attorney, this civil action could have been stayed, saving plaintiffs, this Court and the defendants' attorney a significant amount of time and expense. Particularly, plaintiffs point out that the parties were briefing cross-motions for summary judgment at the same time that the amendments eliminating the "self-preservation" requirement had been approved by the Legislative Rule Making Committee and that the intention to introduce them into the legislature had been announced at the Fire Commission meeting. The cross-motions were quite lengthy and quite complex. Indeed, this Court found

it necessary to grant plaintiffs an extension of the twenty-page limit for memoranda imposed by this Court's local rules.

In response, defendant Smittle argues that plaintiffs should have known about the proposed amendments to the Fire Code because public notice of the meetings at which they were to be discussed was given. Additionally, defendant Smittle avers that he "never considered their actions as part of the pending litigation . . . ." (Resp. to Mot. for Attys Fees at 5).

Under the general American rule, each party bears his or her own attorney's fees. However, the Court may invoke its inherent power to assess attorney's fees when a party has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Chambers v. Nasco, Inc.*, 501 U.S. 32, 45 (1991). Although plaintiffs make a very strong argument for an award of attorney's fees under this exception to the general rule, this Court finds that defendants Smittle and the Fire Commission's failure to inform this Court, plaintiffs or their own counsel of the proposed amendment to the Fire Code and the successful progression of those proposed amendments does not quite rise, or sink, to that level of conduct that is sanctioned pursuant to this exception. For this reason, this Court finds that plaintiffs' motion for attorney's fees should be and hereby is DENIED.

D. Order to Show Cause

Rule 11 of the Federal Rules of Civil Procedure provides that a court may, upon its own motion, order an

attorney or a party to show cause as to why his or her behavior in the process of litigation has not violated Rule 11. Fed. R.Civ. P. 11(c)(1)(B). This Court finds that defendants Walter Smittle, the West Virginia Office of the State Fire Marshal, and the West Virginia State Fire Commission's failure to notify plaintiffs and this Court of the proposed amendments and their successful progression through the adoption process may constitute conduct that warrants sanctions under Rule 11. Such notification may have saved plaintiffs' counsel, and even defendants' counsel, the significant amount of time and expense that was accorded to preparing and filing the cross-motions for summary judgment.

Accordingly, this Court hereby DIRECTS defendants Walter Smittle, the West Virginia Office of the State Fire Marshal, and the West Virginia State Fire Commission to submit a memorandum to this Court on or before **February 16, 1999** as an effort to show cause why they have not violated Rule 11. Plaintiffs shall file a response, pursuant to Rule 11, if any, no later than **February 23, 1999**.

IT IS SO ORDERED.

The Clerk is directed to transmit copies of this order to counsel of record herein.

ENTERED: January 29, 1999

s/ Frederick P. Stamp, Jr.

FREDERICK P. STAMP, JR.
UNTIED STATES DISTRICT JUDGE

42 USC § 3613

§ 3613. Enforcement by private persons

(a) Civil action

(1)(A) An aggrieved person may commence a civil action in an appropriate United States district court or State court not later than 2 years after the occurrence or the termination of an alleged discriminatory housing practice, or the breach of a conciliation agreement entered into under this subchapter, whichever occurs last, to obtain appropriate relief with respect to such discriminatory housing practice or breach.

(B) The computation of such 2-year period shall not include any time during which an administrative proceeding under this subchapter was pending with respect to a complaint or charge under this subchapter based upon such discriminatory housing practice. This subparagraph does not apply to actions arising from a breach of a conciliation agreement.

(2) An aggrieved person may commence a civil action under this subsection whether or not a complaint has been filed under section 3610(a) of this title and without regard to the status of any such complaint, but if the Secretary or a State or local agency has obtained a conciliation agreement with the consent of an aggrieved person, no action may be filed under this subsection by such aggrieved person with respect to the alleged discriminatory housing practice which forms the basis

for such complaint except for the purpose of enforcing the terms of such an agreement.

(3) An aggrieved person may not commence a civil action under this subsection with respect to an alleged discriminatory housing practice which forms the basis of a charge issued by the Secretary if an administrative law judge has commenced a hearing on the record under this subchapter with respect to such charge.

(b) Appointment of attorney by court

Upon application by a person alleging a discriminatory housing practice or a person against whom such a practice is alleged, the court may -

(1) appoint an attorney for such person; or

(2) authorize the commencement or continuation of a civil action under subsection (a) of this section without the payment of fees, costs, or security, if in the opinion of the court such person is financially unable to bear the costs of such action.

(c) Relief which may be granted

(1) In a civil action under subsection (a) of this section, if the court finds that a discriminatory housing practice has occurred or is about to occur, the court may award to the

plaintiff actual and punitive damages, and subject to subsection (d) of this section, may grant as relief, as the court deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order (including an order enjoining the defendant from engaging in such practice or ordering such affirmative action as may be appropriate).

(2) In a civil action under subsection (a) of this section, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs. The United States shall be liable for such fees and costs to the same extent as a private person.

(d) Effect on certain sales, encumbrances, and rentals

Relief granted under this section shall not affect any contract, sale, encumbrance, or lease consummated before the granting of such relief and involving a bona fide purchaser, encumbrancer, or tenant, without actual notice of the filing of a complaint with the Secretary or civil action under this subchapter.

(e) Intervention by Attorney General

Upon timely application, the Attorney General may intervene in such civil action, if the Attorney General certifies that the case is of general public importance. Upon such intervention the Attorney General may obtain such relief as would be available to the Attorney General under section

3614(e) of this title in a civil action to which such section applies.

42 USC § 12205

§ 12205. Attorney's fees

In any action or administrative proceeding commenced pursuant to this chapter, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs, and the United States shall be liable for the foregoing the same as a private individual.

Supreme Court, U.S.
FILED
AUG - 8 2000
CLERK

(2)

99-1848

IN THE
SUPREME COURT OF THE UNITED STATES

BUCKHANNON BOARD & CARE HOME, INC.; THE WEST VIRGINIA RESIDENTIAL BOARD AND CARE HOME ASSOCIATION; DORSEY PIECE; and on behalf of all others similarly situated,

Petitioners,

v.

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, et al.,

Respondents.

RESPONDENT, WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Darrell V. McGraw Jr.
Attorney General

Charlene A. Vaughan
Deputy Attorney General
State Capitol Complex
Building 3; Room 210
Charleston, West Virginia 25305
(304) 558-2131
Counsel for Respondent, West Virginia Department of Health and Human Resources

3000

QUESTIONS PRESENTED

1. Whether the Fourth Circuit erred in its interpretation of *Farrar v. Hobby*, 506 U.S. 103, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992), in *S-1 and S-2 v. State Board of Education*, 21 F.3d 49 (4th Cir.) (en banc), *cert. denied*, 513 U.S. 876, 115 S.Ct. 205, 130 L.Ed.2d 135 (1994), in concluding that the "catalyst theory" is no longer available for civil rights plaintiffs to recover attorneys' fees.

2. Whether a Plaintiff can prevail through catalyst theory alone.

3. Whether Petitioners obtained an enforceable judgment or other comparable relief against Respondents through a consent decree or settlement which entitles them to attorneys' fees.

THE PARTIES

The following were parties in the United States Court of Appeals: Joan E. Ohl, Secretary, West Virginia Department of Health and Human Resources; Office of Health Facility Licensure and Certification; John Wilkinson, Director, Office of Health Facility Licensure and Certification; Sandra L. Daubman, Residential Programs Manager, Office of Health Facility Licensure and Certification (Daubman has been replaced by Gloria Pauley); West Virginia Office of the State Fire Marshal, Walter Smittle, Fire Marshal; Cecil Underwood, in his official capacity as Governor of the State of West Virginia; State of West Virginia; West Virginia State Fire Commission; John Beaty, II, Commissioner; Joseph J. Bostar, III, Commissioner; Randy Breeden, Commissioner; James W. Fife, Commissioner; Francis A. Guffey, II, Commissioner; Daniel Hess, Commissioner; Gregory Alan Lay, Commissioner; David L. Tolliver, Commissioner; Stephen C. McBee, Commissioner; Bill L. Spencer, Commissioner; Victor Stallard, Jr., Commissioner; J. D. Waggoner, Commissioner; and Kenneth Morgan, Commissioner.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

THE PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

BASIS FOR JURISDICTION 1

OPINIONS BELOW 2

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 3

REASONS FOR DENYING THE WRIT 3

A. The United States Court of Appeals for the Fourth Circuit Has Not Misinterpreted this Court's Ruling in *Farrar v. Hobby* 3

B. Petitioners Did Not Obtain an Enforceable Judgment or Other Comparable Relief Through a Consent Decree or Settlement Against Respondents Which Entitles Them to Attorneys' Fees. 9

CONCLUSION 10

APPENDIX

Buckhannon Board and Care, Inc. et al. v. West Virginia Department of Health and Human Resources, et al., *Per Curiam* Opinion, Unpublished No. 99-1424 ..... A-1

Order on Petition for Rehearing and Rehearing *En Banc* A-7

TABLE OF AUTHORITIES

PAGE

CASES

American Council of the Blind v. Romer, 506 U.S. 1075, 113 S. Ct. 1038, 122 L. Ed. 2d 348 (1993), *vacating* 962 F.2d 1501 (10th Cir. 1992) 7

American Council of the Blind v. Romer, 992 F.2d 249 (10th Cir. 1993) 8

Arvinger v. Mayor and City Council of Baltimore, 31 F.3d 196 (4th Cir. 1994) 8

Baumgartner v. Harrisburg Housing Authority, 21 F.3d 541 (3rd Cir. 1994) 6, 8

Beard v. Teska, 31 F.3d 942 (10th Cir. 1994) 7

Bonnes v. Long, 599 F.2d 1316 (4th Cir. 1979), *overruled* by, *S-1 and S-2*, 21 F.3d 49 (4th Cir. 1994) 9

Citizens Against Tax Waste v. Westerville City School, 985 F.2d 255 (6th Cir. 1993) 6, 7

Farrar v. Hobby, 506 U.S. 103, 113 S. Ct. 566, 121 L. Ed. 2d 494 (1992) ..... *passim*

Foreman v. Dallas County, 193 F.3d 314 (5th Cir. 1999), *cert. denied*, __ U.S. __, 120 S.Ct. 1673, 146 L.Ed.2d 482 6

Friend v. Kolodzieczak, 992 F.2d 243 (9th Cir. 1993) 8

Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., _____ U.S. _____, 120 S. Ct. 693, 145 L. Ed.2d 610 (2000) 9

Hensley v. Eckerhart, 461 U.S. 424, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983) 4

Hewitt v. Helms, 482 U.S. 755, 107 S. Ct. 2672, 96 L. Ed. 2d 654 (1987) 5, 6

Kilgour v. Pasadena, 53 F.3d 1007 (9th Cir. 1995) 7

Klolodzieczak v. Friend, 113 S.Ct. 1038, 506 US 1075, 122 L.Ed. 348 (1993), *vacating* 965 F.2d 682 (9th Cir. 1992) 7

Little Rock School District v. Pulaski County Special Sch. District #1, 17 F.3d 260 (8th Cir. 1994) 7, 8

Maher v. Gagne, 448 U.S. 122, 100 S. Ct. 2570, 65 L. Ed.2d 653 (1980) 4

Marbley v. Bane, 57 F.3d 224 (2nd Cir. 1995) 6

Morris v. West Palm Beach, 194 F.3d 1203 (11th Cir. 1999) 7

Paris v. United States Dep't of Housing and Urban Development, 988 F.2d 236 (1st Cir. 1993) 6, 7

Pembroke v. Wood County, 981 F.2d 225 (5th Cir. 1993), *cert. denied*, 508 U.S. 973, 113 S.Ct. 2965, 125 L.Ed.2d 665 (1993) 7

Rhodes v. Stewart, 488 U.S. 1, 109 S. Ct. 202, 102 L. Ed. 2d 1 (1988) 5

S-1 and S-2 v. State Board of Education, 21 F.3d 49 (4th Cir.), *cert. denied*, 513 U.S. 876, 115 S. Ct. 205, 130 L. Ed. 2d 135 (1994) ..... *passim*

Statewide Reapportionment Advisory Committee v. Beasley, 99 F.2d 134 (4th Cir. 1996), *cert. denied*, 520 U.S. 1166 (1997) 3, 8

Texas State Teachers Association v. Garland Independent School District, 489 U.S. 782, 109 S. Ct. 1486, 103 L. Ed. 2d 866 (1989) 6

Zinn v. Shalala, 35 F.3d 273 (7th Cir. 1994) 6

STATUTES

28 U.S.C. § 1254(1) 1

Civil Rights Attorney's Fee Awards Act of 1976, 90 Stat. 2641 (1976) (codified, as amended, 42 U.S.C. § 1988) 4, 5

Fed. R. Civ. P. 11(c)(1)(B) 2, 10

W. Va. Code § 16-5H-2(3) (1996) 3

OTHER

64 C.S.R. 65-3.14 (Aug. 1, 1997) 3

Sup. Ct. R. 24(2) 2

99-1848

IN THE
SUPREME COURT OF THE UNITED STATES

BUCKHANNON BOARD & CARE HOME, INC.; THE WEST VIRGINIA RESIDENTIAL BOARD AND CARE HOME ASSOCIATION; DORSEY PIECE; and on behalf of all others similarly situated,

Petitioners,

v.

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, et al.,

Respondents.

RESPONDENT, WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

BASIS FOR JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) with Petitioners' filing of a petition for writ of certiorari on May 12, 2000.

The United States District Court for the Northern District of West Virginia, Judge Stamp, on January 29, 1999, entered an Order denying Petitioners' Motion for Attorneys Fees (JA 320) to which Petitioners appealed to the United States Court of Appeals for the

Fourth Circuit. On January 20, 2000, the Fourth Circuit entered judgment affirming the District Court's denial of Petitioners' Motion for Attorneys' Fees. (App. 1). The Fourth Circuit, on February 15, 2000, denied Petitioners' Petition for Rehearing. (App.7).

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Fourth Circuit, Docket No. 99-1424, is dated January 20, 2000.

The unreported opinion of the United States District Court for the Northern District of West Virginia, Civil Action No. 2:96CV106, is dated January 29, 1999.

By Order entered January 29, 1999, United States District Court Judge Stamp held this action had been rendered moot by the passage of House Bill 4200 and Senate Bill 627. (JA 320.) He further determined that Petitioners were not entitled to attorney fees and costs as prevailing parties under the "catalyst theory," nor did a bad-faith exception apply. (JA-327-30.) Pursuant to Fed. R. Civ. P. 11(c)(1)(B), Judge Stamp did determine that Rule 11 sanctions were warranted based on the State Fire Marshal's failure to disclose to the Petitioners earlier on that he was going to propose the deletion of the self-preservation requirements and ordered payment of fees and costs to Petitioners in the amount of $3,252.00. (JA 335.)

STATEMENT OF THE CASE

Pursuant to Sup. Ct. R. 24(2), Respondents are satisfied with the presentation of Petitioners' Statement of the Case, except for the allegations that the Fourth Circuit's opinion that attorneys' fees are not available under the "catalyst theory" is contrary to this Court's ruling in *Farrar v. Hobby*, 506 U.S. 103, 113 S.Ct. 566, 121 L.E.2d 494 (1992), rendered in *S-1 and S-2 v. State Bd. of Educ.*, 21 F.3d 49

(4th Cir. 1994) (en banc), *cert. denied*, 513 U.S. 876, 115 S.Ct. 205, 130 L.Ed. 135 (1994).

SUMMARY OF ARGUMENT

The Petitioners have not obtained an enforceable judgment or other comparable relief through a consent decree or settlement. This lawsuit cannot be said to be the catalyst for the deletion of the "self-preservation" requirements from W. Va. Code § 16-5H-2(3) (1996) or 64 C.S.R. 65-3.14 (Aug. 1, 1997). The catalyst theory alone cannot serve as the basis for Petitioners' claim to prevailing party status. Therefore, Petitioners are not entitled to attorneys' fees.

REASONS FOR DENYING THE WRIT

A. The United States Court of Appeals for the Fourth Circuit Has Not Misinterpreted this Court's Ruling in *Farrar v. Hobby*.

Petitioners are asking this Court to reverse the Fourth Circuit's interpretation of *Farrar v. Hobby*, 506 U.S. 103, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992), rendered in *S-1 and S-2 v. State Bd. of Educ.*, 21 F.3d 49 (4th Cir. 1994) (en banc), *cert. denied*, 513 U.S. 876, 115 S.Ct. 205, 130 L.Ed.2d 135 (1994), and *Statewide Reapportionment Advisory Committee v. Beasley*, 99 F.2d 134 (4th Cir. 1996), *cert. denied*, 520 U.S. 1166 (1997), concluding that the "catalyst theory" is not available for civil rights plaintiffs to recover attorneys' fees and costs. Secondly, Petitioners are asking this Court to remand this case back to the District Court with instructions to consider Petitioners' Motion for Attorney Fees.

In *Farrar*, this Court announced a distinctly new test: The plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought or comparable relief through a consent decree or settlement. Whatever relief the plaintiff secures must directly benefit him at the time of the judgment or settlement.

Otherwise the judgment or settlement cannot be said to "affec[t] the behavior of the defendant toward the plaintiff." Only under these circumstances can civil rights litigation affect "the material alteration of the legal relationship of the parties" and thereby transform the plaintiff into a prevailing party. *Id.* 113 S.Ct. at 573 (alteration in original) (citations omitted). This Court emphasized that "[n]o material alteration of the legal relationship between the parties occurs until the plaintiff becomes entitled to enforce a judgment, consent decree, or settlement against the defendant." *Id.* at 574. Under *Farrar*, a nominal damages judgment was entered. And this Court held that the nominal damages judgment, being legally enforceable, conferred prevailing party status. *Id.* at 574. This Court cautioned, however, that sometimes "even a plaintiff who formally 'prevails' under Section 1988 should receive no attorney's fees at all." *Id.* at 575. In other words, no longer will the prevailing party inquiry turn on the magnitude of relief. *See id.* at 574 (noting that "the 'technical' nature of a nominal damages award or any other judgment does not affect the prevailing party inquiry"). So, under *Farrar*, a technical victory renders a plaintiff a prevailing party, but will not necessarily entitle the plaintiff to fees.

For years after the passage of the Civil Rights Attorney's Fee Awards Act of 1976, 90 Stat. 2641 (1976) (codified, as amended, 42 U.S.C. § 1988), case law held that, although a plaintiff need not obtain formal relief to recover fees, the plaintiff must enjoy "substantial or essential" success in obtaining the objective of the suit, and the suit must be a proximate cause of any relief obtained. *See Maher v. Gagne*, 448 U.S. 122, 129, 100 S.Ct. 2570, 65 L.Ed.2d 653 (1980). In *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983), this Court suggested without deciding that plaintiffs may become prevailing parties for fee purposes by succeeding on "any significant issue in litigation which achieves some of the benefit the parties sought in brining suit" (internal quotation marks omitted), this causation-centered test of prevailing party statutes became known as the "catalyst theory."

The lower federal courts agreed that a plaintiff claiming prevailing party status through informal success must demonstrate a casual connection between the lawsuit and the favorable result; however, the lower courts were split on whether the plaintiff must also demonstrate some merit to the lawsuits' claims. The Fourth Circuit was in the minority with its decision in *Bonnes v. Long*, 599 F.2d 1316 (4th Cir. 1979), *overruled by S-1 and S-2*, 21 F.3d 49 (4th Cir. 1994), which held plaintiff's unadjudicated claim had to meet a substantiality threshold.

This Court then decided a series of cases on prevailing party status under 42 U.S.C. § 1988. *See Hewitt v. Helms*, 482 U.S. 755, 107 S.Ct. 2672, 96 L.Ed.2d 654 (1987) (a judicial pronouncement constitutes relief on the merits only if it settles some dispute which affects the behavior of the defendant toward the plaintiff); *Rhodes v. Stewart*, 488 U.S. 1, 109 S.Ct. 202, 102 L.Ed.2d 1 (1988) (per curiam) (a declaratory judgment constitutes relief, for purposes of § 1988, if, and only if, it affects the behavior of the defendant toward the plaintiff; however, these plaintiffs received no relief because the case was moot before judgment); *Texas State Teachers Ass'n v. Garland Independent School District*, 489 U.S. 782, 109 S.Ct. 1486, 103 L.Ed.2d 866 (1989) (to be considered a prevailing party, the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant).

Then, in 1992, this Court decided *Farrar v. Hobby*, 506 U.S. 103, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992). In *Farrar*, the plaintiff alleged due process violations and malicious prosecution in connection with the closing of his school for disabled teens. The plaintiff sought $17 million in damages, but was awarded only nominal damages. The District Court awarded the plaintiff $280,000 in fees plus expenses and interest. A divided Fifth Circuit ruled that the nominal damages award did not in any meaningful sense change the legal relationship between the parties. This Court held that the Fifth Circuit erred in not recognizing the plaintiffs as prevailing parties under the settled principle that plaintiffs, who obtain only

nominal or modest relief, are considered prevailing parties for fee-award purposes. This Court reaffirmed *Garland's* "legal relationship" test and added the language at issue in *S-1 and S-2* when it stated, "[n]o material alteration of the legal relationship between the parties occurs until the plaintiff becomes entitled to enforce a judgment, consent degree, or settlement against the defendant." *Farrar*, 113 S.Ct. at 574. This Court upheld the Fifth Circuit's reversal of the District Court's fee award holding that the amount of the fee award depends on the degree of success achieved. This Court noted that "[t]his litigation accomplished little beyond giving petitioners 'the moral satisfaction of knowing that a federal court concluded that [their] rights had been violated' in some unspecified way." *Id.* at 574 (quoting *Hewitt v. Helms*, 482 U.S. 755, 762, 107 S.Ct. 2672, 96 L.Ed.2d 654 (1987)).

In *Farrar v. Hobby*, this Court created a more demanding test for prevailing party status, which clearly discards catalyst theory from the prevailing party inquiry. In a five-to-four decision, this Court affirmed the Fifth Circuit's denial of fees and noted that the threshold requirement of prevailing party status serves the congressional intent to permit fee awards "'only when a party has prevailed on the merits.'" *Farrar*, 113 S.Ct. at 569, 572.

Petitioners argue in their reasons for granting their Writ that the United States Court of Appeals for the Fourth Circuit has misinterpreted this Court's opinion in *Farrar v. Hobby*, 506 U.S. 103, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992). Respondents submit that the Fourth Circuit did not misinterpret *Farrar*, in spite of all other United States Court of Appeals decisions to the contrary. *See Paris v. United States Dep't of Housing and Urban Development*, 988 F.2d 236, 238 (1st Cir. 1993); *Marbley v. Bane*, 57 F.3d 224, 234 (2nd Cir. 1995); *Baumgartner v. Harrisburg Housing Authority*, 21 F.3d 541, 546-550 (3rd Cir. 1994); *Foreman v. Dallas County*, 193 F.3d 314 (5th Cir. 1999), *cert. denied*, __ U.S. __, 120 S.Ct. 1673, 146 L.Ed.2d 482; *Citizens Against Tax Waste v. Westerville City School*, 985 F.2d 255, 257 (6th Cir. 1993); *Zinn v. Shalala*, 35

F.3d 273, 276 (7th Cir. 1994); *Little Rock School Dist. v. Pulaski County Special Sch. Dist. #1*, 17 F.3d 260, 263, n.2 (8th Cir. 1994); *Kilgour v. Pasadena*, 53 F.3d 1007, 1010 (9th Cir. 1995); *Beard v. Teska*, 31 F.3d 942, 951-952 (10th Cir. 1994); *Morris v. West Palm Beach*, 194 F.3d 1203, 1207 (11th Cir. 1999).

All Circuit Court of Appeals, but for the Fourth Circuit, have recognized a conflict between *Farrar* and catalyst theory, but have taken pains to invent implausible solutions to the problem. Although both the United States Court of Appeals for the First Circuit and the Sixth Circuit applied the catalyst theory to grant prevailing party status to plaintiffs, each failed to acknowledge the potential impact of *Farrar's* enforceable judgment requirement. *See, Paris v. United States Dep't of Housing and Urban Development*, 988 F.2d 236, 240-41 (1st Cir. 1993); *Citizens Against Tax Waste v. Westerville City Sch.*, 985 F.2d 255, 257-58, n.3 (6th Cir. 1993). Similarly, the Fifth Circuit, when confronted with a catalytic fee claim, circumvented the enforceable judgment standard by limiting *Farrar* to "the context of nominal damages." *See, Pembroke v. Wood County*, 981 F.2d 225 (5th Cir. 1993), *cert. denied*, 508 U.S. 973, 113 S.Ct. 2965, 125 L.Ed.2d 665 (1993) ("*Farrar* dealt with prevailing party status and the award of attorney's fees in the context of nominal damages and is thus distinguishable from the present case.").

The question of the catalyst theory's continued survival emerged more directly when this Court summarily vacated and remanded two cases that had applied the theory to uphold plaintiffs' prevailing party status. *See, American Council of the Blind v. Romer*, 506 U.S. 1075, 113 S. Ct. 1038, 122 L.Ed.2d 348 (1993), *vacating* 962 F.2d 1501 (10th Cir. 1992); *Klolodzieczak v. Friend*, 113 S.Ct. 1038, 506 US 1075, 122 L.Ed. 348 (1993), *vacating* 965 F.2d 682 (9th Cir. 1992). The lower courts were directed to reconsider their decisions and apply *Farrar*. *American Council*, 113 S.Ct. at 1038; *Kolodzieczak*, 113 S.Ct. at 1038. The United States Court of Appeals for the Tenth Circuit conceded that *Farrar* might

seem to prevent plaintiffs from using catalyst theory to gain prevailing party status. *See American Council of the Blind v. Romer,* 992 F.2d 249, 251 (10th Cir. 1993) (alternative holding) ("Perhaps [under] *Farrar* the 'catalyst rule' should . . . not [apply] to the prevailing party [inquiry]."). Ultimately, that court determined otherwise and applied the catalyst theory. *See id.* ("It does not appear that the decision in *Farrar* condemns the use of the 'catalyst rule' in a nonjudgment on the merits situation."). The United States Court of Appeals for the Ninth Circuit simply remanded to the district court for reconsideration under *Farrar. See, Friend v. Kolodzieczak,* 992 F.2d 243 (9th Cir. 1993). The United States Court of Appeals for the Eighth Circuit declined to apply *Farrar* "beyond its context of determining prevailing party status after a final determination on the merits of litigation." *See Little Rock School District v. Pulaski County Special Sch. Dist #1*, 17 F.3d 260, 263, n.2 (8th Cir. 1994). The United States Court of Appeals for the Third Circuit similarly attempted to resolve the inconsistency between *Farrar* and the catalyst theory. *See Baumgartner v. Harrisburg Hous. Auth.,* 21 F.3d 541, 547 (3rd Cir. 1994). It reasoned that *Farrar* involved a fee claim supported by a judgment, so the "situation" before the Supreme Court did not involve catalyst theory. *See id.* "Therefore, any language implicating the 'catalyst theory' was dictum." *See id.*

The Fourth Circuit addressed the viability of the "catalyst theory" after *Farrar* in *S-1 and S-2 v. State Bd. of Educ.*, 21 F.3d 49 (4th Cir. 1994), and declared that the catalyst theory was no longer available to litigants in this circuit in fee-shifting cases. *See also Statewide Reapportionment Advisory Committee v. Beasley*, 99 F.3d 134 (4th Cir. 1996), *cert. denied* 520 U.S. 1166 (1997); *Arvinger v. Mayor and City Council of Baltimore*, 31 F.3d 196 (4th Cir. 1994). In *S-1 and S-2*, the Fourth Circuit adopted the dissenting opinion of

Judge Wilkinson from its previous *S-1 and S-2*[1] and ruled that "[a] person may not be a 'prevailing party' plaintiff under 42 U.S.C. § 1988 except by virtue of having obtained an enforceable judgment, consent decree, or settlement giving some of the legal relief sought in § 1983 action. *S-1 and S-2*, 21 F.3d at 50, *citing Farrar*, 506 U.S. 103, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992). That Court also ruled "[t]he fact that a lawsuit may operate as a catalyst for post-litigation changes in a defendant's conduct cannot suffice to establish plaintiff as a prevailing party." Catalyst theory, "allowing that result, is no longer available for the purpose. *See Farrar*, 506 U.S. at __, and cases such as *Bonnes v. Long*, 599 F.2d 1316 (4th Cir. 1979), which applied that theory, are overruled." *S-1 and S-2,* 21 F.3d at 51.

B. Petitioners Did Not Obtain an Enforceable Judgment or Other Comparable Relief Through a Consent Decree or Settlement Against Respondents Which Entitles Them to Attorneys' Fees.

Petitioners clearly did not obtain an enforceable judgment or other comparable relief through a consent decree or settlement against Respondents which entitles them to attorneys' fees.

Petitioners' reliance upon *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, ___ U.S. ___, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000) is a misplaced attempt to circumvent the unequivocal *Farrar* requirement that prevailing party status requires a fee claimant to be entitled to enforce a judgment, consent decree, or settlement. All nine of the Justices applied the enforceable judgment requirement in *Farrar. See Farrar*, 113 S.Ct. at 576 (O'Connor, J., concurring) (noting that Farrar met the "minimum condition for prevailing party status because he obtained

---

[1] *S-1 and S-2 v. State Bd. of Educ.*, 6 F.3d 160 (4th Cir. 1993), *vacated* 21 F.3d 49 (4th Cir. 1994) (en banc).

an enforceable judgment") *id.* at 579 (White, J., concurring in part and dissenting in part). ("Because Farrar won an enforceable judgement . . . he is a 'prevailing party' under the statue." (Citation omitted)). Farrar was awarded nominal damages. Petitioners in the instant matter have been awarded no damages. Petitioners have won no enforceable judgment against the West Virginia Department of Health and Human Resources. Even the Fed. R. Civ. P. 11 sanction award was against the State Fire Marshal, not the Department.

Respondents submit that the list of ways to earn prevailing party status is exclusive, and that a plaintiff can no longer prevail through catalyst theory alone. Respondents submit that there has been no enforceable judgment or comparable relief through a consent decree or settlement which would quality Petitioners as a prevailing party. *Farrar v. Hobby*, 113 S.Ct. at 573. Whatever relief the Petitioners secured must directly benefit them at the time of the judgment. Otherwise, the judgment cannot be said to "affec[t] the behavior of the defendant toward the plaintiff." *Id.* at 111 (internal citations omitted). The present case was dismissed as moot. Petitioners obtained no judgment. There was no settlement. Their suit cannot still be a catalyst for change and for the recovery of attorneys' fees. It is further submitted that Respondent's voluntary change in conduct should not be "a license to shake down government officials." *S-1 and S-2*, 6 F.3d at 172, *citing Farrar*, 506 U.S. at 122.

The Fourth Circuit correctly interpreted that *Farrar* prevents a plaintiff from prevailing through the catalyst theory alone, but must also meet the enforceable judgment requirement. Petitioners in this case have never met the enforceable judgement requirement.

CONCLUSION

The Court should deny the Petition for Writ of Certiorari, and affirming the holding of the Fourth Circuit in *S-1 and S-2*.

Respectfully submitted,

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES/ OFFICE OF HEALTH FACILITY LICENSURE AND CERTIFICATION

Respondents,
By Counsel

DARRELL V. McGRAW JR.
ATTORNEY GENERAL

Charlene A. Vaughan

CHARLENE A. VAUGHAN
DEPUTY ATTORNEY GENERAL
State Capitol Complex
Building 3, Room 210
Charleston, West Virginia 25305
(304) 558-2131
(WV Bar ID No. 3855)

August 8, 2000

APPENDIX

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BUCKHANNON BOARD AND CARE HOME, INCORPORATED; THE WEST VIRGINIA RESIDENTIAL BOARD AND CARE HOME ASSOCIATION; DORSEY PIERCE, by her next friend, Lockie J. Marple, and on behalf of all others similarly situated,

Plaintiffs-Appellants,

and

ALMOST HOME, INCORPORATED; DAISY LAYMAN, by her next friend, Faye Byers,
Plaintiffs,

v. No. 99-1424

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES; GRETCHEN O. LEWIS, Secretary, West Virginia Department of Health and Human Resources; OFFICE OF HEALTH FACILITY LICENSURE AND CERTIFICATION; NANCY TYLER, Director, Office of Health Facility Licensure and Certification; SANDRA L. DAUBMAN, Program Manager, Office of Health Facility Licensure and Certification; WEST VIRGINIA OFFICE OF THE STATE FIRE MARSHAL; WALTER SMITTLE, Fire Marshal; GASTON CAPERTON, in his official capacity as Governor of the State of West Virginia; STATE OF WEST VIRGINIA; WEST VIRGINIA STATE FIRE COMMISSION; JOHN BEATY, II, Commissioner; JOSEPH J. BOSTAR, III, Commissioner; RANDY BREEDON, Commissioner JAMES W.

FIFE, Commissioner; FRANCIS A. GUFFEY, II, Commissioner; DANIEL HESS, Commissioner; GREGORY ALAN LAY, Commissioner; DAVID L. TOLLIVER, Commissioner; STEPHEN C. McBEE, Commissioner; BILL L. SPENCER, Commissioner; VICTOR STALLARD, JR., Commissioner; J. D. WAGGONER, Commissioner; KENNETH MORGAN, Commissioner; JOAN E. OHL, Secretary, Department of Health and Human Resources; JOHN WILKENSON, Director, Office of Health Facility Licensure and Certification; CECIL H. UNDERWOOD, Governor, State of West Virginia,

Defendants-Appellees,

and

WEST VIRGINIA STATE BOARD OF EXAMINERS FOR REGISTERED PROFESSIONAL NURSES; LAURA S. RHODES, Executive Director, West Virginia State Board of Examiners for Registered Professional Nurses,

Defendants.

Appeal from the United States District Court
for the Northern District of West Virginia, at Elkins.
Frederick P. Stamp, Jr., Chief District Judge.
(CA-96-106-2)

Argued: December 2, 1999

Decided: January 20, 2000

Before NIEMEYER and MOTZ, Circuit Judges,
and BUTZNER, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Webster J. Arceneaux, III, LEWIS, FRIEDBERG, GLASSER, CASEY & ROLLINS, L.L.P., Charleston, West Virginia, for Appellants. David Paul Cleek, OFFICE OF THE ATTORNEY GENERAL, Charleston, West Virginia; Charlene Ann Vaughan, Deputy Attorney General, WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN SERVICES, Charleston, West Virginia, for Appellees. **ON BRIEF:** Sandra K. Henson, LEWIS, FRIEDBERG, GLASSER, CASEY & ROLLINS, L.L.P., Charleston, West Virginia, for Appellants. Darrell V. McGraw, Jr., Attorney General, Chad M. Cardinal, Assistant Attorney General, Charleston, West Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

The appellants in this case ask us to reexamine our holding in *S-1 and S-2 v. State Board of Education of North Carolina*, 21 F.3d 49 (4th Cir. 1994) (en banc), which rejected the catalyst theory when determining whether to award attorneys fees under federal statutes making fees awardable to prevailing parties. As a three-judge panel of the court, however, we are bound by our precedent. *See Joseph v. Angelone*, 184 F.3d 320, 324-25 (4th Cir. 1999). Accordingly, we affirm the judgment of the district court that relied on *S-1 and S-2* in denying appellants' motion for attorneys fees.

Buckhannon Board and Care Home, Inc. ("Buckhannon"), which operates residential care homes for elderly people who require some assistance in the activities of daily living, failed an inspection by the West Virginia Office of the State Fire Marshal because it housed residents incapable of self-preservation, in violation of West Virginia law. *See* W. Va. Code § 16-5H-2 (1998) (requiring that all residents of residential board and care homes be capable of self-preservation). Buckhannon and other plaintiffs commenced this action for a declaratory judgment that the state law violated the Fair Housing Amendments Act ("FHAA"), 42 U.S.C. § 3601 *et seq.*, and the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.*

While the action was pending, West Virginia amended state law to delete the self-preservation requirement. None of the defendants, however, informed the plaintiffs or the court of the pending amendments. Indeed, the district court noted that the defendants did not even inform their own attorney, who was representing them in this action. As a result of the amendments, this action became moot, and the district court dismissed it.

Although Buckhannon did not obtain the change in state law through an enforceable judgment, consent decree, or settlement, it claimed nevertheless that it was the prevailing party entitled to attorneys fees under the FHAA and the ADA. *See* 42 U.S.C. § 3613(c)(2) 42 U.S.C. § 12205. Buckhannon argued that under a catalyst theory it obtained the relief it sought through the defendants' voluntary conduct because it filed this action and brought to the state's attention the flaws in its law. The district court observed that if the catalyst theory were available in this circuit, the plaintiffs "might prevail." However, because this circuit had rejected the catalyst theory in *S-1 and S-2*, the district court denied the plaintiffs' motion for attorneys fees.

On this appeal, the appellants challenge "only the district court's ruling on the disallowance of attorneys fees and costs under the 'catalyst theory.'" They urge us to reexamine our decision in *S-1 and S-2*, which, they acknowledge, would, if applied, require rejection of their appeal.

The Fourth Circuit has determined that panels of the court are bound by the prior decisions of the court, *en banc* or in panel, and that binding precedent can be reversed only by the court *en banc*. *See Joseph*, 184 F.3d at 325 ("As a panel, we are not authorized to reconsider an *en banc* holding even if we happen to be so inclined, which we are not"); *Busby v. Crown Supply, Inc.*, 896 F.2d 833, 840-41 (4th Cir. 1990) ("[A] panel considers itself bound by the prior decision of another panel, absent an *in banc* overruling or a superseding contrary decision of the Supreme Court").

In *S-1 and S-2*, we held that in order to qualify as a "prevailing party" in litigation, the plaintiff must, through the litigation, "'obtain an enforceable judgment . . . or comparable relief through a consent decree or settlement.'" *S-1 and S-2 v. State Board of Education of North Carolina*, 6 F.3d 160, 168 (4th Cir. 1993) (Wilkinson, J., dissenting) (quoting *Farrar v. Hobby*, 506 U.S. 103, 111 (1992)), *vacated*, 21 F.3d 49 (1994) (*en banc*) (adopting Judge

Wilkinson's dissent as the majority opinion). Because the plaintiffs did not bring about the change in West Virginia law through any judgment, decree, or settlement, we conclude that the district court properly applied *S-1 and S-2* to this case. Accordingly, the judgment of the district court

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
February 15, 2000

NO. 99- 1424
CA-96-106-2

BUCKHANNON BOARD AND CARE HOME, INC; THE WEST VIRGINIA RESIDENTIAL BOARD AND CARE HOME ASSOCIATION; DORSEY PIERCE, by her next friend, Lockie J. Marple, and on behalf of all others similarly situated,

Plaintiffs - Appellants,

and

ALMOST HOME, INCORPORATED; DAISY LAYMAN, by her next friend, Faye Byers

Plaintiffs

v.

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES; GRETCHEN O. LEWIS, Secretary, West Virginia Department of Health and Human Resources; OFFICE OF HEALTH FACILITY LICENSURE AND CERTIFICATION; NANCY TYLER, Director, Office of Health Facility Licensure and Certification; SANDRA L. DAUBMAN, Program Manager, Office of Health Facility Licensure and Certification; WEST VIRGINIA OFFICE OF THE STATE FIRE MARSHAL; WALTER SMITTLE, Fire Marshal; GASTON CAPERTON, in his official capacity as Governor of the State of West Virginia; STATE OF WEST VIRGINIA, WEST VIRGINIA STATE FIRE COMMISSION;

JOHN BEATY, II, Commissioner; JOSEPH J. BOSTAR, III, Commissioner; RANDY BREEDEN, Commissioner, JAMES W. FIFE, Commissioner; FRANCIS A. GUFFEY, II, Commissioner; DANIEL HESS, Commissioner; GREGORY ALAN LAY, Commissioner; DAVID L. TOLLIVER, Commissioner; STEPHEN C. MCBEE, Commissioner; BILL L. SPENCER, Commissioner; VICTOR STALLARD, JR., Commissioner; J. D. WAGGONER, Commissioner; KENNETH MORGAN, Commissioner; JOAN E. OIL, Secretary Department of Health and Human Resources; JOHN WILKINSON, Director, Office of Health Facility Licensure and Certification; CECIL H. UNDERWOOD, Governor, State of West Virginia

Defendants - Appellees

WEST VIRGINIA STATE BOARD OF EXAMINERS FOR REGISTERED PROFESSIONAL NURSES; LAURA S. RHODES, Executive Director, West Virginia State Board of Examiners for Registered Professional Nurses

Defendants

On Petition for Rehearing and Rehearing En Banc

Appellants' petition for rehearing and rehearing on en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied.

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied

For the Court,

/s/ Patricia S. Conner

Clerk

Supreme Court, U.S.
FILED
AUG 14 2000
OFFICE OF THE CLERK

No. 99-1848

In The

Supreme Court of the United States

BUCKHANNON BOARD AND CARE HOME, INC.; THE WEST VIRGINIA RESIDENTIAL BOARD AND CARE HOME ASSOCIATION; DORSEY PIERCE; and on behalf of all others similarly situated,

Petitioners,

v.

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

DARRELL V. MCGRAW, JR.
Attorney General

DAVID P. CLEEK
Senior Deputy Attorney General
Counsel of Record

SCOTT E. JOHNSON
Senior Assistant Attorney General
State Capitol, Room E-26
Charleston, West Virginia 25305
(304) 558-2021

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

30 pp

QUESTION PRESENTED

Is the catalyst theory a viable approach to govern federal courts in awarding fees under federal fee-shifting statutes?

LIST OF PARTIES

The list of parties set forth in the Petition for a Writ of Certiorari is generally accurate, with these exceptions. At the time the suit was filed below, Walter Smittle was the West Virginia State Fire Marshal. In the interim, Marshal Smittle retired and was replaced by State Fire Marshal Sterling Lewis. Likewise, Randy Breeden, James W. Fife, Daniel Hess, Gregory Alan Lay, and Stephen C. McBee are no longer State Fire Commissioners. The new Fire Commissioners who have replaced these individuals are John S. Bailey, II, Charles L. Eversole, Wayne A. Lewis, James L. Oldaker, and Chuck Nunyon. Consequently, these new commissioners and the new Fire Marshal are proper parties. *See* S. Ct. R. 35.3.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
CITATION OF REPORTS	1
JURISDICTION	1
STATUTORY AND CONSTITUTIONAL PROVISIONS	1
1. Statutory Provisions	1
2. Constitutional provisions	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	5
REASONS FOR DENYING THE WRIT	6
A. This Court Should Not Grant Certiorari In This Case As There Exists A Question Of The Jurisdiction Of The Courts Below To Entertain It And This Case Is Not A Good Vehicle To Resolve Any Of The Issues The Case Presents	6
1. The Federal Fair Housing Act Amendments of 1988	9
2. The Americans with Disabilities Act	14
B. This Court Should Not Grant Certiorari In This Case As It Presents A Less Than Desirable Vehicle To Address The Validity Of Catalyst Theory	16
CONCLUSION	22

TABLE OF AUTHORITIES

Page

CASES

Appalachian Power Co. v. Tax Department, 466 S.E.2d 424 (W. Va. 1995) 4

Bell v. New Jersey, 461 U.S. 773 (1983) 6

Bender v. Williamsport Area School District, 475 U.S. 534 (1986) 20

Bly v. McLeod, 605 F.2d 134 (4th Cir. 1979) 20

Bread Political Action Committee v. Federal Electric Commission, 455 U.S. 577 (1982) 19

Dellmuth v. Muth, 491 U.S. 223 (1989) 9, 12, 13

Edelman v. Jordan, 415 U.S. 651 (1974) 8

Employees of Department of Public Health and Welfare v. Department of Public Health and Welfare, 411 U.S. 279 (1973) 12

Finn v. United States, 856 F.2d 606 (4th Cir. 1988) 15

Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, 119 S.Ct. 2199 (1999) 15

Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945) 7

Foreman v. Dallas County, 193 F.3d 314 (5th Cir. 1999) 16, 19, 21

Garrett v. University of Alabama, 193 F.3d 1214 (11th Cir. 1999) 15

Hendricks v. Bowen, 847 F.2d 1255 (7th Cir. 1988) 18

TABLE OF AUTHORITIES – Continued

Page

Hensley v. Eckerhart, 461 U.S. 424 (1983) 17, 18, 21

Institutionalized Juveniles v. Secretary of Public Welfare, 758 F.2d 897 (3d Cir. 1985) 18

Kimel v. Florida Board of Regents, 120 S.Ct. 631 (1999) 8, 9, 10, 12

Kokkonen v. Guardian Life Insurance Co., 511 U.S. 375 (1994) 6

McKesson Corp. v. Division of Alcoholic Beverages, 496 U.S. 18 (1990) 13

Michael M. v. Sonoma County, 450 U.S. 464 (1981) 20

Milton v. Shalala, 17 F.3d 812 (5th Cir. 1994) 16, 18

In re Mitchell, 209 F.3d 1111 (9th Cir. 2000) 13

New Hampshire v. Adams, 159 F.3d 680 (1st Cir. 1998) 16

Overseas Education Associate, Inc. v. Federal Labor Relations Authority, 876 F.2d 960 (D.C. Cir. 1989) 19

Petrone v. Secretary of Health and Human Services, 936 F.2d 428 (9th Cir. 1991) 18

Ex Parte Reed, 100 U.S. 13 (1879) 8

Rhoten v. Bowen, 854 F.2d 667 (4th Cir. 1988) 18

Risbeck Food Markets, Inc. v. United Food and Commercial Workers Union, 404 S.E.2d 404 (W. Va. 1991) 14

S-1 and S-2 v. State Board of Education, 21 F.3d 49 (4th Cir.), *cert. denied*, 513 U.S. 876 (1994) 5

Satterfield v. Claypool, 438 S.E.2d 564 (W. Va. 1993) 13

TABLE OF AUTHORITIES – Continued

Page

Seminole Tribe v. Florida, 517 U.S. 44 (1996) 10, 11

Soon Hing v. Crowley, 113 U.S. 703 (1885) 20

Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998) 7, 8

Tenney v. Brandhove, 341 U.S. 367 (1951) 20

Texas Teachers v. Garland School District, 489 U.S. 782 (1989) 18

Truax v. Bowen, 842 F.2d 995 (8th Cir. 1988) 18

United States Catholic Conference v. Abortion Rights Mobilization, Inc., 487 U.S. 72 (1988) 7

United States v. O'Brien, 391 U.S. 367 (1968) 20

Vermont Agency for Natural Resources v. United States ex rel. Stevens, 120 S.Ct. 1858 (2000) ... 8, 11, 12

Will v. Michigan Department of State Police, 491 U.S. 58 (1989) 11

CONSTITUTIONAL PROVISIONS

Eleventh Amendment 2, 5, 7, 8

Fourteenth Amendment 3, 8, 15

STATUTES

Equal Access to Justice Act, 28 U.S.C. § 2412(b) 17

Americans with Disabilities Act, 42 U.S.C. § 12201 to 12213 ..... *passim*

Federal Fair Housing Amendments Act, Act of 1988, 42 U.S.C. § 3601 to 3619 ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

I 1998 W. Va. Acts 983-986 5

II 1998 W. Va. Acts 1198-99 5

West Virginia Administrative Procedures Act, Chapter 29A, Article 5 of the West Virginia Code 3

West Virginia Fire Control and Prevention Act, W. Va. Code § 29-3-1 to -25 3

W. Va. Code § 29A-3-12 4

W. Va. Code §§ 29A-5-15 to -15b 4

West Virginia Residential Board and Care Homes Statute W. Va. Code §§ 16-5H-1 to -18 .....4, 16

W. Va. Code of State Rules, tit. 87 .....4, 16

TREATISES

2 Martin A. Schwartz & John E. Kirklin, *Section 1983 Litigation: Claims, Defenses, and Fees* (2d ed. 1991) 18

CITATION OF REPORTS

The citation of reports set forth in the Petition for a Writ of Certiorari is accurate and will not be restated here.

JURISDICTION

The Petitioner properly invokes the certiorari jurisdiction of this Court.

STATUTORY AND CONSTITUTIONAL PROVISIONS

1. Statutory Provisions

The Federal Fair Housing Amendments Act provides, in pertinent part:

> An aggrieved person may commence a civil action in an appropriate United States district court or State court not later than 2 years after the occurrence or the termination of an alleged discriminatory housing practice, or the breach of a conciliation agreement entered into under this title, whichever occurs last, to obtain appropriate relief with respect to such discriminatory housing practice or breach.

42 U.S.C. § 3613(a)(1)(A).

> In a civil action under subsection (a), the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs. The United States shall be liable for such fees and costs to the same extent as a private person.

42 U.S.C. § 3613(c)(2).

The Americans with Disabilities Act provides, in pertinent part:

The abrogation provision of the Americans with Disabilities Act, 42 U.S.C. § 12202, provides:

> A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this act. In any action against a State for a violation of the requirements of this act, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation.

42 U.S.C. § 12202.

> In any action or administrative proceeding commenced pursuant to this act, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs, and the United States shall be liable for the foregoing the same as a private individual.

42 U.S.C. § 12205.

2. Constitutional provisions

The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another

> State, or by Citizens or Subjects of any Foreign State.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

Section 1: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

Section 5: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

STATEMENT OF THE CASE

The West Virginia Fire Control and Prevention Act, W. Va. Code § 29-3-1 to -25, creates the position of the West Virginia State Fire Marshal and the West Virginia State Fire Commission. The Fire Prevention and Control Act authorizes the Fire Commission to promulgate, amend and repeal regulations relating to the safeguarding of life and property from the hazards of fire and explosions. W. Va. Code § 29-3-5(a). The procedural mechanism for implementing this legislative directive is the West Virginia Administrative Procedures Act, found in Chapter 29A, Article 5 of the West Virginia Code (W. Va. APA).

Under the W. Va. APA, West Virginia's administrative agencies do not have the general and independent power to promulgate binding rules. Rather, with certain exceptions

inapplicable here,[1] "legislative rules," (those having the force and effect of law) must be passed into effect by the West Virginia Legislature. *See* W. Va. Code § 29A-3-12.

Under this authority, and prior to 1998, the Fire Commission promulgated certain regulations in the West Virginia Fire Code which included the term "self-preservation." W. Va. Code of State Rules, tit. 87, ser. 1, § 14.7.1. "Self-preservation" was defined to mean "A person is capable of removing his or her physical self from situations involving imminent danger, such as fire." *Id.* § 14.7 The West Virginia Residential Board and Care Homes (RBHC) statute also contained "self-preservation" language. W. Va. Code § 16-5H-1 (noting a state policy to encourage and promote resourcing to ensure the effective care and treatment of the physically or mentally impaired who depend on the care of others and who are capable of self-preservation); *id.* § 16-5H-2(*l*) (defining self-preservation as meaning "that a person is, at least, capable of removing his or herself from situations involving imminent danger, such as fire. . . . "); *id.* § 16-5H-2(j).

The Petitioners challenged the Fire Code's self-preservation regulations and the self-preservation language in the RBHC in the district court. The Petitioners alleged the "self-preservation" language violated, and was preempted by, the Federal Fair Housing Amendments Act (FFHAA), 42 U.S.C. §§ 3601 to 3619, and Titles II and III of the Americans with Disabilities Act (ADA).

---

[1] *See* W. Va. Code §§ 29A-5-15 to -15b (discussing "emergency rules"). *See also Appalachian Power Co. v. Tax Dep't*, 466 S.E.2d 424, 434 (W. Va. 1995).

During the pendency of the litigation in district court, the West Virginia Legislature amended the State Fire Code to delete any reference to "self-preservation." *See* II 1998 W. Va. Acts 1198-99. Likewise, the West Virginia Legislature amended portions of the West Virginia RBHC statute by deleting the "self-preservation" language at issue in the case below. *See* I 1998 W. Va. Acts 983-986.

The district court presiding over the litigation dismissed the case as moot in light of the legislative action. It also refused to award attorney's fees considering itself bound by the Fourth Circuit precedent of *S-1 and S-2 v. State Board of Education*, 21 F.3d 49 (4th Cir.) (per curiam) (en banc), *cert. denied*, 513 U.S. 876 (1994). A panel of the Court of Appeals for the Fourth Circuit affirmed the district court's refusal on the basis of *S-1 and S-2*. The Court of Appeals subsequently refused the Petitioner's request for an en banc rehearing.

SUMMARY OF ARGUMENT

This Court should not grant the Petition for a Writ of Certiorari as there is a question as to whether the Eleventh Amendment divested the district court of jurisdiction in this case. If the district court lacked jurisdiction over the case, it would have lacked authority to award attorney's fees. Because there exists an important issue of whether the statutes at issue in this case validly or even did waive the states' immunity under the Eleventh Amendment (and the record in this case is not well developed), this Court should not grant the certiorari,

especially since the Court has before it a case where it will address constitutional applicability of the ADA to the states.

Moreover, the facts of this case, where any relief that the Petitioners claim obtained was as a result of third-party legislative action, make it a poor vehicle to address the narrow issue of whether catalyst theory exists at all, as well as a poor vehicle to address whether – if catalyst theory does exist – it should apply when the relief is the result of non-party legislative action. As all of these questions are still being addressed by the lower federal courts, this Court should not take this case and await a better vehicle to address the issues this case raises.

REASONS FOR DENYING THE WRIT

A. This Court Should Not Grant Certiorari In This Case As There Exists A Question Of The Jurisdiction Of The Courts Below To Entertain It And This Case Is Not A Good Vehicle To Resolve Any Of The Issues The Case Presents.

"Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute. . . . " *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). "Since federal courts are courts of limited jurisdiction, the court below could hear the case only if authorized by statute." *Bell v. New Jersey*, 461 U.S. 773, 777 (1983).

> [E]very federal appellate court has a special obligation to "satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review," even though the parties are prepared to concede it. "And if the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it. [When the lower federal court] lack[s] jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit."

Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 95 (1998) (citations omitted). "The Eleventh Amendment declares a policy and sets forth an explicit limitation on federal judicial power of such compelling force that this Court will consider the issue arising under this Amendment in this case even though urged for the first time in this Court." *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 467 (1945). In the proceedings below, the Respondent Fire Marshal raised the Eleventh Amendment issue in its answer, which was apparently not pressed by the Respondent below.

Before this Court may proceed further in this proceeding, it must satisfy itself that the lower court had jurisdiction. *See, e.g., Steel Co.*, 523 U.S. at 95. In the absence of subject matter jurisdiction, a court's orders are void. *See, e.g., United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76 (1988) ("[i]f a district court does not have subject-matter jurisdiction over the underlying action, and the process was not issued in aid of determining that jurisdiction, then the process is void and an order of civil contempt based on refusal to honor it must be reversed."). " 'Without jurisdiction the court cannot proceed at all in any cause.' "

Steel Co., 523 U.S. at 94 (quoting *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868)). Thus, if the district court lacked jurisdiction over this case, its authority was limited to " 'announcing the fact and dismissing the cause.' " *Steel Co.*, 523 U.S. at 94 (quoting *Ex Parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868)). Any act beyond a dismissal would be void. *See, e.g., Ex Parte Reed*, 100 U.S. 13, 23 (1879) ("Every act of a court beyond its jurisdiction is void.") *See also Vermont Agency for Natural Resources v. United States ex rel. Stevens*, 120 S. Ct. 1858, 1865 (2000) ("Questions of jurisdiction, of course, should be given priority – since if there is no jurisdiction there is no authority to sit in judgment of anything else.")

The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Eleventh Amendment acts in the nature of a jurisdictional check on the lower federal courts. *See, e.g., Edelman v. Jordan*, 415 U.S. 651, 678 (1974) (recognizing that the Eleventh Amendment "partakes of the nature of a jurisdictional bar. . . . ").

The Congress, however, may abrogate a State's immunity by enacting legislation pursuant to its enforcement authority under section 5 of the Fourteenth Amendment and by making its intent to abrogate the State's immunity "unmistakably clear" in the statute. *See, e.g., Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631, 640 (1999)

("To determine whether a federal statute properly subjects States to suits by individuals, we apply a 'simple but stringent test: "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute." ' *Dellmuth v. Muth*, 491 U.S. 223, 228, 109 S. Ct. 2397, 105 L. Ed. 2d 181 (1989) (quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242, 105 S. Ct. 3142, 87 L.Ed.2d 171 (1985)."); *id.* at 644 ("Section 5 of the Fourteenth Amendment, however, does grant Congress the authority to abrogate the States' sovereign immunity."). In this case, neither of the federal statutes under which the Petitioners proceeded in district court meets the abrogation criteria.

1. The Federal Fair Housing Act Amendments Of 1988

In order for the Congress to validly abrogate a state's immunity, it must make its intention "unmistakably clear" in the statute. *See, e.g., Kimel*, 120 S. Ct. at 640 (citations omitted). This Court addressed in several cases the clarity necessary to evidence a Congressional abrogation of the states' immunity. For example, in *Kimel*, this Court addressed the abrogation language of the Age Discrimination in Employment Act (ADEA). In finding the ADEA evidenced a Congressional waiver, the Court reasoned:

> The ADEA states that its provisions "shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section." 29 U.S.C. § 626(b). Section 216(b), in

> turn, clearly provides for suits by individuals against States. That provision authorizes employees to maintain actions for backpay "against any employer (including a public agency) in any Federal or State court of competent jurisdiction. . . . " Any doubt concerning the identity of the "public agency" defendant named in § 216(b) is dispelled by looking to § 203(x), which defines the term to include "the government of a State or political subdivision thereof," and "any agency of . . . a State, or a political subdivision of a State." Read as a whole, the plain language of these provisions clearly demonstrates Congress' intent to subject the States to suit for money damages at the hands of individual employees.

Kimel, 120 S. Ct. at 640.

Equally, in *Seminole Tribe v. Florida*, 517 U.S. 44, 55 (1996), the Court found "a clear legislative statement" of a Congressional intent to abrogate the States' immunity under the Indian Gaming Regulatory Act by reasoning:

> Section 2710(d)(7)(A)(i) vests jurisdiction in "[t]he United States district courts . . . over any cause of action . . . arising from the failure of a State to enter into negotiations . . . or to conduct such negotiations in good faith." Any conceivable doubt as to the identity of the defendant in an action under § 2710(d)(7)(A)(i) is dispelled when one looks to the various provisions of § 2710(d)(7)(B), which describe the remedial scheme available to a tribe that files suit under § 2710(d)(7)(A)(i). Section 2710(d)(7)(B)(ii)(II) provides that if a suing tribe meets its burden of proof, then the "burden of proof shall be upon

> the State . . . "; § 2710(d)(7)(B)(iii) states that if the court "finds that the State has failed to negotiate in good faith . . . , the court shall order the State . . . "; § 2710(d)(7)(B)(iv) provides that "the State shall . . . submit to a mediator appointed by the court" and subsection (B)(v) of § 2710(d)(7) states that the mediator "shall submit to the State." Sections 2710(d)(7)(B)(vi) and (vii) also refer to the "State" in a context that makes it clear that the State is the defendant to the suit brought by an Indian tribe under § 2710(d)(7)(A)(i). In sum, we think that the numerous references to the "State" in the text of § 2710(d)(7)(B) make it indubitable that Congress intended through the Act to abrogate the States' sovereign immunity from suit.

Seminole Tribe, 517 U.S. at 56-57.

Nothing in the Federal Fair Housing Amendments Act of 1988 (FFHAA), 42 U.S.C. §§ 3601 to 3619, 3631, contains any such expansive language which provides either a "clear legislative statement" or which makes unmistakably clear a Congressional intent to abrogate the states' immunity. Indeed, 42 U.S.C. § 3602(n) defines "Respondent" as "(1) the person or other entity accused in a complaint of an unfair housing practice; and (2) any other person or entity identified in the course of investigation and notified as required with respect to respondents so identified under section 810(a)." Under long settled canons of construction, a court must presume a state is not a "person" as that term is used by Congress. *See, e.g., Vermont Agency of Natural Resources*, 120 S. Ct. at 1866 ("We must apply to this text our longstanding interpretive presumption that 'person' does not include the sovereign."); *Will v. Michigan Dep't of State Police*, 491 U.S.

58, 65 (1989) (the state is not a "person" under 42 U.S.C. § 1983). "The presumption is 'particularly applicable where it is claimed that Congress has subjected the States to liability to which they had not been subject before.' *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 64, 109 S. Ct. 2304, 105 L.Ed.2d 45 (1989); *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 667, 99 S. Ct. 2529, 61 L.Ed.2d 153 (1979)." *Vermont Agency of Natural Resources*, 120 S. Ct. at 1866-67. The presumption "may be disregarded only upon some affirmative showing of statutory intent to the contrary." *Id.* at 1867.

Indeed, the private cause of action provision in the FFHAA, 42 U.S.C. § 3613(a), is remarkably similar to the statutory language this Court found did not affect a Congressional waiver of the states' sovereign immunity under the Fair Labor Standards Act (FLSA). In *Employees of Dept. of Public Health and Welfare v. Department of Public Health and Welfare*, 411 U.S. 279, 283 (1973), this Court concluded that FLSA terminology providing an "[a]ction to recover such liability may be maintained in any court of competent jurisdiction" did not abrogate the states' immunity. *See also Kimel*, 120 S. Ct. at 654-55 (Thomas and Kennedy, JJ., dissenting in part and concurring in part) (relying on *Employees*); *id.* at 655 (recognizing that in *Dellmuth v. Muth*, 491 U.S. 223, 228 (1989), the Court held "that Congress had not clearly stated its intent to abrogate in a statute that authorized 'parties aggrieved . . . to "bring a civil action . . . in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy")' (quoting 20 U.S.C. § 1415(e)(2) (1982 ed.)").

The private enforcement provision of the FFHAA provides that "[a]n aggrieved person may commence a civil action in an appropriate United States district court or State Court. . . . " 42 U.S.C. § 3613(a)(1)(A). In *Delmuth v. Muth*, 491 U.S. 223, 231 (1989) (quoting *Atascadero v. Scanlon*, 473 U.S. 234, 246 (1985)), this Court said, " '[a] general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment.' " Thus, the *Delmuth* recognition is of even greater strength here, where the Congress has authorized suits not simply in Federal court, but in state court as well.

Of course, the FFHAA contains an explicit statutory preemption clause. 42 U.S.C. § 3615. A preemption clause, however, is not a clear and unmistakable abrogation of state immunity. *Cf. In re Mitchell*, 209 F.3d 1111, 1121 (9th Cir. 2000) (emphasis in original) ("Similarly, the Supremacy Clause dictates that federal law trumps state law, but does not *itself abrogate* state sovereign immunity in federal court: although a state may be bound by federal law, a private party is not entitled to utilize a federal court to determine a state's obligations."). This is especially so where state courts – equal partners in the constitutional scheme for adjudicating the supremacy of federal law[2] – have undertaken to adjudicate and enforce preemption in their state courts. *See, e.g., Satterfield v. Claypool*, 438

---

[2] *See, e.g., McKesson Corp. v. Division of Alcoholic Beverages*, 496 U.S. 18, 28 (1990) (quoting *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 340 (1816)) (" '[I]t is plain that the framers of the constitution did contemplate that cases within the judicial cognizance of the United States not only might but would arise in the state courts, in the exercise of their ordinary jurisdiction.' ").

S.E.2d 564, 565 (W. Va. 1993) (holding that federal law preempted state law); *Risbeck Food Markets, Inc. v. United Food and Commercial Workers Union*, 404 S.E.2d 404, 405 (W. Va. 1991) (similar).

Nothing in the FFHAA includes any language evidencing Congress' clear intent to abrogate the states' immunity. If anything, it contains certain language similar to that which this Court has found does not affect an abrogation.

The Petitioners seek certiorari so this Court may address the validity of the catalyst theory. However, in order for this Court to reach the catalyst issue, it would first have to address the important and intricate immunity issues. This Court should not grant certiorari in this case, but, rather, should await the presentation of a case more cleanly presenting the catalyst issue and a case more cleanly presenting the immunity issues.

2. The Americans With Disabilities Act

There is no doubt that Congress clearly evidenced an intent to abrogate the states' immunity under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 to 12213. Title 42, section 12202 of the United States Code provides:

> A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this act. In any action against a State for a violation of the requirements of this act, remedies (including remedies both at law and in equity)

> are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

The question becomes whether this abrogation is consistent with the remedial power granted to Congress under Section 5 of the Fourteenth Amendment. *See Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 119 S. Ct. 2199, 2205 (1999) (reiterating that Congress cannot divest the states of their sovereign immunity under Article I).

If the abrogation of the states' immunity under 42 U.S.C. § 12202 is invalid, then the district court in the pending case would have had no jurisdiction to award attorneys fees at all. *See Finn v. United States*, 856 F.2d 606, 608 (4th Cir. 1988) ("[I]f subject matter jurisdiction has not been found to attach when the plaintiff obtains the desired relief, plaintiff's success outside the courtroom cannot be a proper basis for an award of EAJA fees.").

Currently, this Court has granted certiorari in *Garrett v. University of Alabama*, 193 F.3d 1214 (11th Cir. 1999). Because *Garrett* presents the same issue as the case *sub judice* would present, that is, the constitutionality of the ADA (and presents it with a fully developed record), the Court should not grant the writ in this case.

B. This Court Should Not Grant Certiorari In This Case As It Presents A Less Than Desirable Vehicle To Address The Validity Of Catalyst Theory.

The Petitioners seek review in this Court to determine whether the catalyst theory is a viable approach to the award of attorneys fees under federal fee-shifting statutes. The facts of this case, however, are more complex than those associated with normal factual backgrounds presenting the catalyst theory (assuming, of course, that catalyst theory is viable). Consequently, this case presents an inappropriate vehicle to address either the narrow issue of whether catalyst theory exists at all or as the broader issue of whether catalyst theory (if it exists) should be construed to extend to the facts of this case.

In the proceedings below, the district court dismissed the Petitioners' suit as moot after the West Virginia Legislature removed the "self-preservation" language from the West Virginia Fire Code, W. Va. Code of State R., tit. 87, ser. 1, and from the Residential Board and Care Homes Statute. W. Va. Code § 16-5H-2 (Supp. 2000).

Under the catalyst theory, a plaintiff would be entitled to fees if the lawsuit was a "catalyst" that caused (from the plaintiff's perspective) a positive outcome. The tests the lower courts have applied range from whether the litigation was a "provocative function," *see, e.g., New Hampshire v. Adams*, 159 F.3d 680, 685 (1st Cir. 1998), or a "substantial factor or significant catalyst," *see, e.g., Foreman v. Dallas County*, 193 F.3d 314, 321 (5th Cir. 1999), or whether the litigation was a "but for" cause. *See, e.g., Milton v. Shalala*, 17 F.3d 812, 814 (5th Cir. 1994). Implicit

in all these cases, and in the catalyst theory generally, is whether the party requesting an award of fees has proven the litigation caused the change in the defendant's behavior. It is this recognition that makes this case an inappropriate vehicle to address catalyst theory. In this case, any relief the Petitioners claim to have received came not from a party to the ligation, but from a legislature that was not a party to the litigation. This being the case, there exists significant procedural and policy impediments to establishing a catalyst theory when the legislature acts. As this Court recognized in *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983), "[a] request for attorney's fees should not result in a second major litigation."

The lower federal courts have addressed cases where parties wished to apply a catalyst theory to legislative acts occurring during federal litigation. A prototypical example of this is litigation resulting from the Social Security Disability Reform Act of 1988 ("the Reform Act"). The Reform Act mandated that federal actions then pending concerning Social Security disability be remanded to the Secretary of Health and Human Services to determine whether disability benefits should be terminated in light of newly enacted standards. Numerous parties in federal court seeking judicial review of adverse Social Security disability determinations under the old standards won benefits under the legislative remand. These parties then sought an award of attorneys fees under the Equal Access to Justice Act[3] arguing that their

---

[3] The Equal Access to Justice Act (EAJA) uses the term "prevailing party." 28 U.S.C. § 2412(b). Therefore, the cases of lower courts under the EAJA have bearing on any case where

pending lawsuits were the catalyst for the Congressional action.

In rejecting this approach, the court of appeals in *Milton v. Shalala*, 17 F.3d 812, 815 (5th Cir. 1994) incisively noted:

> The mere possibility that Congress acted because of an individual claimant's suit (or reacted to a large number of similar suits) is too speculative in our view considering the many influences upon members of Congress in casting their votes. We agree with the cases that have refused to credit the change in law to a claimant's individual law suit and found the nexus between Congress's action and the law suit too attenuated.

The Fifth Circuit found support in its position under *Petrone v. Secretary of Health and Human Services*, 936 F.2d 428, 430 (9th Cir. 1991); *Hendricks v. Bowen*, 847 F.2d 1255, 1258 (7th Cir. 1988); and *Truax v. Bowen*, 842 F.2d 995, 997 (8th Cir. 1988). *But see Rhoten v. Bowen*, 854 F.2d 667 (4th Cir. 1988); *Institutionalized Juveniles v. Secretary of Public Welfare*, 758 F.2d 897, 917 (3d Cir. 1985).

---

the Congress employs the statutory term "prevailing party." *See, e.g., Hensley*, 461 U.S. at 433 n.7; *Texas Teachers v. Garland School Dist.*, 489 U.S. 782, 784 (1989) (discussing the need to resolve the definition of "prevailing party" under section 1988 and other federal fee-shifting statutes.) *See generally* 2 Martin A. Schwartz & John E. Kirklin, *Section 1983 Litigation: Claims, Defenses, and Fees* § 17.3 at 6 (2d ed. 1991) ("Congress and the Supreme Court alike have viewed § 1988 and other federal fee-shifting statutes that also provide for reasonable attorney's fees for the successful party in litigation as largely governed by the same interpretive standard.").

The recent Fifth Circuit case of *Foreman v. Dallas County*, 193 F.3d 314, 321-22 (5th Cir. 1999), cogently recognizes why attributing a causative relationship between a lawsuit and a legislative act is a hazardous undertaking – i.e., the legislative process is fraught with compromises, competing interests and unspoken motives. Thus, a plaintiff who attempts to prove that her individual lawsuit was a catalyst behind passage of general legislation faces a "formidable task."

The formidable task is even more imposing in light of the hurdles that our political and federal system places upon a plaintiff. For example, this Court has specifically refused to afford any probative value to alter the fact affidavits of congressmen in interpreting the intent of Congress in passing legislation, recognizing that " 'post hoc observations by a single member of Congress carry little weight.' " *Bread Political Action Committee v. Federal Elec. Comm'n*, 455 U.S. 577, 582 n.3 (1982) (quoting *Quern v. Mandley*, 436 U.S. 725, 736 n.10 (1978)). And, indeed, some jurists have noted the inherent weakness of even contemporary statements from legislative sponsors. *See, e.g., Overseas Educ. Assoc., Inc. v. Federal Labor Relations Auth.*, 876 F.2d 960, 974-75 (D.C. Cir. 1989) (emphasis in original) (Buckley and Starr, JJ., concurring) ("Far less reliable, as sources of statutory meaning, are remarks made during floor debate – even 'authoritative' explanations offered by a bill's sponsors. While a sponsor's statements may reveal *his* understanding and intentions, they hardly provide definitive insights into *Congress'* understanding of the meaning of a particular provision.").

The hurdle placed upon a plaintiff seeking to prove an entitlement to fees when a legislature acts also confronts the fact that a collegial body acts as a collegial body, not as a conglomeration of individuals. *See id. Cf. Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 545 (1986) (individual member of school board lacked standing to appeal an order when the board did not vote to appeal order).

Moreover, to expose a member of Congress or a state legislature or even a county or municipal legislator to discovery and depositions runs afoul of the long rooted and "unquestioned" principle rooted in our governmental structure that "it [is] not consonant with our scheme of government for a court to inquire into the motives of legislators . . . " *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951) (citing *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1809)), *see Bly v. McLeod*, 605 F.2d 134, 138 n.6 (4th Cir. 1979) (noting the issue of, without deciding, whether catalyst theory would allow a party to inquire into the motives of a legislator in enacting legislation), and threatens to an unprecedented degree federal judicial involvement in state and local legislative activities.

Indeed, this Court has recognized, "[i]nquiries into congressional motives or purposes are a hazardous matter," *United States v. O'Brien*, 391 U.S. 367, 383 (1968), as legislators act for a variety of reasons. *See Michael M. v. Sonoma County*, 450 U.S. 464, 470 (1981). As this Court correctly observed more than a century ago, "[t]he diverse character of such motives, and the impossibility of penetrating into the hearts of men and ascertaining the truth, precludes all such inquiries as impracticable and futile." *Soon Hing v. Crowley*, 113 U.S. 703, 710-11 (1885).

Because circuit precedent did not recognize the catalyst theory, there was no basis for an evidentiary hearing exploring these issues. Therefore, this Court lacks an evidentiary record upon which to approach the issue of catalyst theory applied to legislative action to determine if a recognition of catalyst *vis-a-vis* the facts in this case would invite the kind of complex and protracted litigation *Hensley* condemned. The issues, however, as evidenced by *Foreman*, are still being dealt with by the lower federal courts. This Court should not grant certiorari, but should await cases that present better records in order to approach the issues of whether catalyst is a viable theory and, if so, whether the catalyst theory extends to acts taken by a legislative body.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be refused.

Respectfully submitted,

West Virginia State Fire Commission, and the Office of the State Fire Marshal

By counsel

DARRELL V. MCGRAW, JR.
Attorney General

DAVID P. CLEEK
Senior Deputy Attorney General

Counsel of Record

SCOTT E. JOHNSON
Senior Assistant Attorney General
Office of the Attorney General
State Capitol, Room E-26
Charleston, West Virginia 25305
(304) 558-2021

(3)

No. 99-1848

FILED
SEP 11 2000

In The Supreme Court of the United States

BUCKHANNON BOARD AND CARE HOME, INC.; THE WEST VIRGINIA RESIDENTIAL BOARD AND CARE HOME ASSOCIATION; DORSEY PIERCE; and on behalf of all others similarly situated,

Petitioners,

v.

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, *ET AL.*,

Respondents.

ON PETITION FOR A *WRIT* OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONERS' REPLY BRIEF IN SUPPORT OF THE PETITION FOR A *WRIT* OF *CERTIORARI*

Webster J. Arceneaux, III
(WV State Bar I.D. No. 155)
LEWIS, GLASSER, CASEY & ROLLINS, LLP
Suite 700, One Valley Square
Charleston,WV 25301
(304) 345-2000

Counsel for Petitioners

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

1694

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

PETITIONERS' REPLY BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI 1

A The Eleventh Amendment does not deprive this Court of Jurisdiction to consider this Petition 3

1 The Respondents have failed to properly raise the Eleventh Amendment as a defense in this action 3

2 This action arises under the *Ex Parte Young* exception to the Eleventh Amendment 5

3 Attorney's Fees are allowed under the Eleventh Amendment 7

B The Court of Appeals for the Fourth Circuit did not properly decide *S-1 and S-2* 8

C This Court should decide the legal issue regarding the validity of the "catalyst theory" without regard to the factual issues raised by the Respondents 9

CONCLUSION 10

TABLE OF AUTHORITIES

FEDERAL CASES

Ex Parte Young, 209 U S 123, 28 S Ct 441, 52 L Ed 714 (1908) 2,5, 6, 7

Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., __ U S __, 120 S Ct 693, 145 L Ed 2d 610 (2000) 1,2,8,9,10

Green v. Mansour, 474 U S 64, 68, 106 S Ct 423, 88 L Ed 2d 371 (1985) 5

Holmes v. Millcreek Township School District, 205 F 3d 583 (3rd Cir 2000) 9

Hutto v. Finney, 437 U S 678, 98 S Ct 2565, 57 L Ed 2d 522 (1978) 8

Missouri v. Jenkins, 491 U S 274, 109 S Ct 2463, 105 L E 2d 229 (1989) 8

Patsy v. Board of Regents of Florida, 457 U S 496, 102 S Ct 2557, 73 L Ed 2d 172 (1982) 4

S-1 and S-2 v. State Board of Education,
21 F 3d 49 (4th Cir.)(en banc), *cert. denied*, 513 U.S. 876, 115 S.Ct. 205, 130 L Ed 2d 135 (1994) 2,8,9,10

Seminole Tribe v. Florida, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed 2d 714 (1996) 7

University of Alabama Board of Trustees v. Garrett, No. 99-1240 5

Wisconsin Department of Corrections v. Schacht, 524 U.S. 381, 118 S.Ct. 2047, 141 L.Ed 2d 364 (1998) 4

FEDERAL STATUTES

Federal Fair Housing Amendments Act of 1988 (FHAA), 42 U.S.C. §§ 3601, *et seq.* 6

42 U.S.C. § 3613(c)(1) 7

The Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12132, 12182 6

42 U.S.C. § 12133 7

42 U.S.C. § 12188(a)(1) 7

The Indian Gaming Regulatory Act, 25 U.S.C. § 2710(d)(7)(A) 7

PETITIONERS' REPLY BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The Petition for a Writ of Certiorari has been filed with this Court seeking review of the Fourth Circuit's per curiam opinion refusing to consider the Petitioners' request for attorney's fees under the "catalyst theory." This Court should now review this case in order to resolve a conflict between the Circuits, with regard to the continuing validity of the "catalyst theory," and to clarify the language in this Court's decision in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, __ U.S. __, 120 S.Ct. 693, 145 L.Ed. 2d 610 (2000). The decision in *Friends of the Earth* implies that the "catalyst theory" remains a viable mechanism to collect attorney's fees in appropriate cases but this Court did not ultimately decide that issue. This case presents this Court with a perfect opportunity to resolve this conflict between the Circuits regarding the "catalyst theory" and therefore, this Court should accept the Petition for review.

The Respondents West Virginia State Fire Commission, the Office of the State Fire Marshal, the West Virginia Department of Health and Human Resources ("DHHR"), and the Office of Health Facility Licensure and Certification ("OHFLAC") have now filed two separate briefs in opposition to the Petition for a Writ of Certiorari.[1] The two briefs argue

---

[1] At the outset, the Petitioners note for this Court's attention that, no briefs have apparently been filed on behalf of the eighteen named state officials sued in this matter. *See* Petition, List of Parties at ii.

that this Court should not consider the Petition for a Writ of Certiorari because: 1) the Eleventh Amendment deprives this Court of any jurisdiction to consider this matter on appeal; 2) the Court of Appeals for the Fourth Circuit correctly decided *S-1 and S-2 v. State Board of Education*, 21 F.3d 49 (4th Cir.)(en banc), *cert. denied*, 513 U.S. 876, 115 S.Ct. 205, 130 L.Ed.2d 135 (1994); and, 3) this case does not provide an appropriate vehicle to consider the "catalyst theory" since it involves legislative enactments related to the removal of the "self preservation" regulations.

Contrary to the arguments of the Respondents, the Eleventh Amendment is not an impediment to this Court's jurisdiction in this matter because: 1) the Eleventh Amendment was not properly raised in the district court below, and therefore, based upon this Court's precedent, it has been waived by the Respondents; 2) this was an action for prospective declaratory and injunctive relief against individual state officers under *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908); and, 3) this Court has heretofore determined that a motion for attorney's fees is not precluded under the Eleventh Amendment.

The Petitioners also refute the Respondents arguments that *S-1 and S-2* was correctly decided in light of the ten other Court of Appeals that have continued to recognize the validity of the "catalyst theory" in appropriate cases. The validity of that argument is further called into question in light of this Court's recent decision in *Friends of the Earth*. Finally, the

argument of the Respondents that the Petitioners' Motion for Attorney's fees is not factually supported is premature at best. This Court should now accept this Petition to review the validity of the Fourth Circuit's continued rejection of the "catalyst theory." The remainder of this Reply Brief will now review each of these arguments in more detail.

A. The Eleventh Amendment does not deprive this Court of Jurisdiction to consider this Petition.

1. The Respondents have failed to properly raise the Eleventh Amendment as a defense in this action.

The Respondents West Virginia State Fire Commission and the Office of the State Fire Marshal have now raised before this Court, for the first time on appeal, the issue that this Court has no jurisdiction to consider the Petition because of the Eleventh Amendment. While an affirmative defense based upon the Eleventh Amendment was raised by these two parties in their Answer to the original complaint, no party ever raised the Eleventh Amendment in response to the Amended Complaint filed in this action.[2]

---

[2] A review of the docket sheet with the clerk's office reveals that on December 30, 1996, the Petitioners moved to file an Amended Complaint (Docket No. 26). An Order allowing the Amended Complaint was entered on February

Contrary to the arguments of the Respondent State Fire Marshal and State Fire Commission, this Court has previously ruled that the Eleventh Amendment is not a jurisdictional matter as it may be waived if not raised by the State. *Wisconsin Department of Corrections v. Schacht*, 524 U.S. 381, 389, 118 S.Ct. 2047, 141 L.Ed.2d 364 (1998); *Patsy v. Board of Regents of Florida*, 457 U.S. 496, 515, n.19,102 S.Ct. 2557, 73 L.Ed.2d 172 (1982). In this case, it was not raised appropriately by the Respondents at any stage below, and therefore, this Court should consider that it has been waived.

7, 1997 and the Amended Complaint was filed as of that date (Dockets No. 31 and 32). On March 10, 1997, the Respondents filed a Response to the Amended Complaint that incorporated by reference their prior Motions to Dismiss and Motions for Summary Judgment (Docket No. 39). None of these pleadings raised an Eleventh Amendment defense. The Respondents' Motions to Dismiss were granted in part and denied in part by an Order dated February 19, 1998 (Docket No. 58). Thereafter, in accordance with Rule 12(a)(4)(B), the Respondents should have filed answers to the Amended Complaint by March 2, 1998. However, the issue of mootness then arose as a result of the actions of the West Virginia Legislature and, instead of filing an answer, the Respondents all filed Motions for a Stay on March 4, 1998 (Docket No.63) and then additional Motions to Dismiss and for Summary Judgment were filed in May, 1998 (Dockets No. 69 and 70) which were ultimately granted and the case was dismissed as moot. None of these pleadings raised a defense based upon the Eleventh Amendment.

To the extent that this Court would allow the Eleventh Amendment to be raised for the first time on appeal, it should be recognized that this position has only been advanced by two of the twenty-two named Respondents in this Civil Action. Therefore, there can be no argument that these other parties who have not raised the Eleventh Amendment have waived it at this stage of the proceedings and this Court has jurisdiction as to those parties to consider the Petition filed in this case.[3]

2. This action arises under the *Ex Parte Young* exception to the Eleventh Amendment.

It is well-established that the Eleventh Amendment does not bar a lawsuit to enjoin a state official from an ongoing violation of federal law. *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). *See also, Green v. Mansour*, 474 U.S. 64, 68, 106 S.Ct. 423, 88 L.Ed.2d 371 (1985). The

---

[3] It is beyond the scope of this Reply Brief to fully respond to the Respondent State Fire Marshal and State Fire Commission's Eleventh Amendment arguments. It appears that as of this time, this Court has not ruled that an action against a state under either the FHAA or the ADA is precluded by the Eleventh Amendment. As the Respondents recognize in their brief, the ADA Eleventh Amendment issue is before this Court this term in *University of Alabama Board of Trustees v. Garrett*, No. 99-1240. The Petitioners would contend that no ruling that the Eleventh Amendment precludes actions under the FHAA or ADA should be made until the parties have the opportunity to fully brief the issue.

Petitioners assert that their underlying claims against the Respondents for violations of the Federal Fair Housing Amendments Act of 1988 ("FHAA"), 42 U.S.C. §§ 3601, *et seq.* and Titles II and III of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12132 and 12182 are not barred by the Eleventh Amendment because they fall squarely within the doctrine of *Ex Parte Young*. Specifically, Petitioners filed the underlying action seeking prospective injunctive relief[4] against seventeen state officials in order to end continuing violations of the FHAA and the ADA.[5] In this regard, the Petitioners asked the District Court to enjoin DHHR, OHFLAC, the Fire Commission, the Fire Marshal, their agents,

---

[4] In the Amended Complaint, Petitioners sought monetary damages against the state agencies and individual defendants. Subsequently, the parties filed a stipulation with the United States District Court for the Northern District of West Virginia stating that the Petitioners would not seek punitive and compensatory damages as originally requested in the Amended Complaint. *See*, Stipulation filed on January 2, 1998 (Docket No. 46).

[5] As noted in footnote one, *supra*, the Briefs filed on behalf of the Respondents neglect to acknowledge their respective representation of the seventeen state officials that the Petitioners sued in their individual capacities. These individuals include: 1) the Secretary of the West Virginia Department of Health and Human Resources; 2) the Director of the Office of Health Facility Licensure and Certification ("OHFLAC"); 3) a Program Manager for OHFLAC; 4) the West Virginia Fire Marshal; and, 5) thirteen West Virginia State Fire Commissioners.

and employees, and successors, from enforcing the challenged "self preservation" regulations against the Petitioners. The Petitioners further asked the District Court to enter a declaratory judgment that the challenged regulations were preempted by the FHAA and the ADA. In light of the nature of the underlying civil action, the Respondents reliance on the Eleventh Amendment as a basis to argue that this Court has no jurisdiction to consider the Petition is misplaced.[6]

3. Attorney's Fees are allowed under the Eleventh Amendment.

---

[6] It is recognized that this Court has held that the exception in *Ex Parte Young* will not apply when a detailed remedial scheme exists in the legislation. *See e.g. Seminole Tribe v. Florida*, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 714 (1996). In *Seminole Tribe*, the State and Governor moved to dismiss the matter based upon the Eleventh Amendment. This Court held, *inter alia*, the *Ex Parte Young* doctrine inapplicable to lift the Eleventh Amendment bar to suit against a state, even though the Tribe sought prospective relief against a state official in his individual capacity, because Congress had provided a detailed remedial scheme in 25 U.S.C. § 2710(d)(7)(A). In contrast to the statutory provision at issue in *Seminole Tribe*, Congress did not provide any sort of detailed remedial scheme in the FHAA and the ADA. Rather, the enforcement provision of these federal civil rights statutes simply make available to private parties basic equitable relief. *See* 42 U.S.C. § 3613(c)(1); 42 U.S.C. § 12133 and 42 U.S.C. § 12188(a)(1).

Finally, this Court has previously recognized that a Motion for Attorney's Fees is to be treated as ancillary prospective relief and therefore, not precluded by the Eleventh Amendment. *Hutto v. Finney*, 437 U.S. 678, 695 n. 24, 98 S.Ct. 2565, 57 L.Ed. 2d 522 (1978); *See also, Missouri v. Jenkins*, 491 U.S. 274, 109 S.Ct. 2463, 105 L.E 2d 229 (1989). The issue before the Court at this time is the validity of the "catalyst theory" and whether it allows the Petitioners' Motion for Attorney's Fees. Given this Court's prior rulings that the Eleventh Amendment does not apply to such Motions for attorney's fees, this Court need not consider the jurisdictional arguments of the Respondent State Fire Marshal and State Fire Commission at this time.

B. The Court of Appeals for the Fourth Circuit did not properly decide *S-1 and S-2*.

The Respondents DHHR and OHFLAC contend that the Court of Appeals for the Fourth Circuit properly decided *S-1 and S-2* and therefore, this Court should not consider this Petition. The Petitioners do not agree with this argument and they stand on the arguments in the original Petition. The Petitioners argue that *S-1 and S-2* is not properly decided in light of the ten other Courts of Appeals that continue to allow attorney's fees under the "catalyst theory." *See* pages 18-22 of the Petition. This argument is further bolstered by this Court's decision in *Friends of the Earth, supra*. This Court should

accept the Petition to resolve the split within the Circuits and to further clarify the discussion in *Friends of the Earth, supra*.[7]

C. This Court should decide the legal issue regarding the validity of the "catalyst theory" without regard to the factual issues raised by the Respondents.

The Respondents State Fire Marshal and State Fire Commission have raised a factual defense in their Brief, stating that this case is not a good case to consider the "catalyst theory" because the change in the "self preservation" regulations was a result of legislative action. This argument is disingenuous at best, given the fact that the State Fire Marshal initiated this change in the regulations a mere six weeks after he was deposed in this case, and after he had personally thwarted the adoption in West Virginia of Chapters 22 and 23 of the Life Safety Code for eleven years. *See* Petition at pages 6-7 and n. 4.

In any event, there has never been any factual development of this issue, as the district court was precluded by the Court of Appeals decision in *S-1 and S-2* from considering

---

[7] It is noted that at least one Court of Appeals has recognized this Court's discussion in *Friends of the Earth, supra*, that there is a split in the Circuits, but it continued to adhere to the "catalyst theory." *Holmes v. Millcreek Township School District*, 205 F.3d 583 at n. 13, (3rd. Cir. 2000)

the Motion for Attorney's Fees. In *Friends of the Earth, supra* this Court held that it was "for the District Court, not this Court, to address in the first instance any request for reimbursement of costs, including fees." 120 S.Ct. at 712. This Court should now accept the Petition and hold as a matter of law that the "catalyst theory" remains a viable means to collect attorney's fees and allow the matter to be fully developed in the district court.

CONCLUSION

This Court should grant *certiorari* to review the Fourth Circuit's decision in this matter and in *S-1 and S-2*. This Court should further remand this case to Chief Judge Frederick P. Stamp, Jr. with the United States District Court for the Northern District of West Virginia with instructions that he consider the Petitioners' Motion for Attorney's Fees.

Respectfully submitted,

Webster J. Arceneaux, III
(WV State Bar I.D. No. 155)
LEWIS, GLASSER, CASEY
& ROLLINS, LLP
Suite 700, One Valley Square
Charleston, West Virginia 25301
(304) 345-2000
Attorney for Petitioners

NOV 17 2000

Record No. 99-1848

In The Supreme Court of the United States

BUCKHANNON BOARD AND CARE HOME, INC.;
THE WEST VIRGINIA RESIDENTIAL
BOARD AND CARE HOME ASSOCIATION;
and on behalf of all others similarly situated,

Petitioners,

v.

WEST VIRGINIA DEPARTMENT OF HEALTH AND
HUMAN RESOURCES, *et al.*,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

BRIEF FOR PETITIONERS

Webster J. Arceneaux, III*
LEWIS, GLASSER, CASEY
& ROLLINS, LLP
Suite 700, One Valley Square
Charleston, WV 25301
(304) 345-2000

Brian A. Glasser
BAILEY & GLASSER, LLP
227 Capitol Street
Charleston, WV 25301
(304) 345-6555

**Counsel of Record for Petitioners*

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

QUESTION PRESENTED

Buckhannon Board and Care Home, Inc., the Residential Board and Care Association, Dorsey Pierce, and a group of similarly situated homes and residents filed a civil action under the Fair Housing Amendments Act of 1988 (FHAA), 42 U.S.C. §§ 3601, *et seq.* and Titles II and III of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12132 and 12182, challenging the Defendants' self-preservation rules. The West Virginia Legislature repealed the self-preservation rules, mooting the case. Plaintiffs requested attorney's fees under the catalyst theory. The district court denied the request because of the United States Court of Appeals for the Fourth Circuit's *en banc* decision in *S-1 and S-2 v. State Board of Education*, 21 F.3d 49, 51 (4th Cir.)(en banc), *cert.denied*, 513 U.S. 876 (1994).

The question presented is:

Whether the Fourth Circuit erred in its interpretation of *Farrar v. Hobby*, 506 U.S. 103 (1992), in *S-1 and S-2*, in concluding that the catalyst theory is no longer available for civil rights plaintiffs to recover attorney's fees.

PARTIES TO THE PROCEEDINGS

In addition to the parties listed in the caption, the following are now parties in this matter: Joan E. Ohl, Secretary, West Virginia Department of Health and Human Resources; Office of Health Facility Licensure and Certification; John Wilkenson, Director, Office of Health Facility Licensure and Certification; Sandra L. Daubman, Program Manager, Office of Health Facility Licensure and Certification; West Virginia Office of the State Fire Marshal, Sterling Lewis, Jr., Fire Marshal; Cecil Underwood, in his official capacity as Governor of the State of West Virginia; State of West Virginia; West Virginia State Fire Commission; John Beaty, II, Commissioner; Joseph J. Bostar, III, Commissioner; John S. Bailey, II, Commissioner; Charles L. Eversole, Commissioner; Francis A. Guffey, II, Commissioner; Wayne A. Lewis, Commissioner; James L. Oldaker, Commissioner; David L. Tolliver, Commissioner; Chuck Nunyon, Commissioner; Bill L. Spencer, Commissioner; Victor Stallard, Jr., Commissioner; J. D. Waggoner, Commissioner; and, Kenneth Morgan, Commissioner.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vii

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

A. Background facts 2

B. The underlying fire safety issue 4

C. Procedural developments in the underlying lawsuit 6

D. The Motion for Attorney's Fees 9

SUMMARY OF THE ARGUMENT 12

ARGUMENT 13

I. CIVIL RIGHTS PLAINTIFFS THAT ARE PREVAILING PARTIES ARE ENTITLED TO THEIR ATTORNEY'S FEES. 13

A. Congress intended private enforcement of civil rights laws. 13

B. Prevailing parties are entitled to attorney's fees under federal fee shifting statutes. 16

C. Prevailing parties under the ADA and FHAA are entitled to attorney's fees. 19

II. ATTORNEY'S FEES MAY BE AWARDED UNDER THE CATALYST THEORY IN CIVIL RIGHTS CASES. 21

A. The Eighth Circuit originated the catalyst theory thirty years ago. 21

B. Congress incorporated the catalyst theory into the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988. 23

C. This Court has recognized that Congress intended to allow the catalyst theory under the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988. 25

D. This Court's decision in *Farrar* does not address the catalyst theory. 28

III. COURTS OF APPEALS HAVE CONTINUED TO APPLY THE CATALYST THEORY IN CIVIL RIGHTS CASES 31

A. Courts of Appeals have uniformly followed the catalyst theory for over thirty years. 31

B. The Fourth Circuit erroneously determined that it could no longer consider the catalyst theory after *Farrar*. 32

C. All other Courts of Appeals have continued to follow the catalyst theory after *Farrar*. ... 35

IV. THE PLAINTIFFS IN THIS CASE ARE ENTITLED TO A REMAND SO THAT THE DISTRICT COURT CAN CONSIDER THEIR REQUEST FOR ATTORNEY'S FEES UNDER THE CATALYST THEORY. . . 40

A. This Court should apply the *Nadeau* test in allowing awards of attorney's fees under the catalyst theory 40

B. Plaintiffs Are Entitled to a Remand 43

CONCLUSION 46

TABLE OF AUTHORITIES

FEDERAL CASES

Albemarle Paper Company v. Moody,
422 U.S. 405 (1975) 14

Aleyska Pipeline Service Company v. Wilderness Society, 421 U.S. 240 (1975) 15

American Council of the Blind v. Romer,
992 F.2d 249 (10th Cir.),
cert. denied, 510 U.S. 864 (1993) 36

Baumgartner v. Harrisburg Housing Authority,
21 F.3d 541 (3d Cir. 1994) 34,36,37

Beard v. Teska, 31 F.3d 942 (10th Cir. 1994) 37

Bonnes v. Long, 599 F.2d 1316 (4th Cir. 1979) 31

Brown v. Gaston County Dyeing Machine Co.,
457 F.2d 1377 (4th Cir.) *cert denied*,
409 U.S. 982 (1972) 24

Brown v. Local 58, International Brotherhood of Electrical Workers, 76 F.3d 762
(6th Cir. 1996) 37

Christiansburg Garment Co. v. E.E.O.C.,
434 U.S. 412 (1978) 31

City of Riverside v. Rivera, 477 U.S. 561 (1986) 16

Citizens Against Tax Waste v. Westerville City School, 985 F.2d 255 (6th Cir. 1993) 33

Citizens Coalition for Block Grant Compliance, Inc. v. City of Euclid, 717 F.2d 964 (6th Cir. 1983) 31

Craig v. Gregg County, Texas,
988 F.2d 18 (5th Cir. 1993) 33,36

Cullens v. Georgia Department of Transportation,
29 F.3d 1489 (11th Cir. 1994) 36

Doty v. County of Lassen, 37 F.3d 540 (9th Cir. 1994) 41,42

Farrar v. Hobby, 506 U.S. 103 (1992) ..... *passim*

Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.,
528 U.S. 167, 120 S.Ct. 693 (2000) 29, 36, 43

Gurule v. Wilson, 635 F.2d 782 (10th Cir. 1980) 32

Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc., 484 U.S. 49 (1987) 27

Hanrahan v. Hampton, 446 U.S. 754 (1980) (*per curiam*) 18,25,26,31,32,34

Hensley v. Eckerhart, 461 U.S. 424 (1983) ..... *passim*

Hewitt v. Helms, 482 U.S. 755 (1987) ..... *passim*

Institutionalized Juveniles v. Secretary of Public Welfare, 758 F.2d 897 (3d Cir. 1985) 44

Kentucky v. Graham, 473 U.S. 159 (1985) 32

Kilgour v. City of Pasadena,
53 F.3d 1007 (9th Cir. 1995) 36,37

Long v. Bonnes, 455 U.S. 961 (1982) 31,40

Little Rock School District v. Special School District 1, 17 F.3d 260, (8th Cir. 1994) 36

Maduka v. Meissner, 114 F.3d 1240
(D.C. Cir. 1997)(*per curiam*) 36

Maher v. Gagne, 448 U.S. 122 (1980) ..... *passim*

Marbley v. Bane, 57 F.3d 224
(2nd Cir. 1995) 35,37,38

Marek v. Chesney, 473 U.S. 1 (1985) 13

Morris v. City of West Palm Beach,
194 F.3d 1203 (11th Cir. 1999) 38,41

N.A.A.C.P. v. Wilmington Medical Center, Inc.,
689 F.2d 1161 (3rd Cir. 1982) 31

Nadeau v. Helgemoe, 581 F.2d 275
(1st Cir. 1978) 31,34,35,40,41

Newman v. Piggie Park Enterprises, Inc.,
390 U.S. 400 (1968) (per curiam) 13,14

*Northcross v. Board of Education of Memphis
City Schools*, 412 U.S. 427 (1973) 20

*Owner-Operator Independent Drivers
Association, Inc. v. Bissell*,
210 F.3d 595 (6th Cir. 2000) 41,45

Oxford House-A v. City of University City,
87 F.3d 1022 (8th Cir. 1996) 21

Parham v. Southwestern Bell Telephone Co.,
433 F.2d 421 (8th Cir. 1970) 21-24

*Paris v. United States Dept. of Housing
& Urban Development*, 988 F.2d 236
(1st Cir. 1993) 21,33,44

*Payne v. Board of Education, Cleveland
City Schools*, 88 F.3d 392 (6th Cir. 1996) 36

*Pottgen v. Missouri State High School
Activities Association*, 103 F.3d 720
(8th Cir. 1997) 21

Rhodes v. Stewart, 488 U.S. 1 (1988)
(*per curiam*) 17

*Roe v. Cheyenne Mountain Conference
Resort, Inc.*, 124 F.3d 1221
(10th Cir. 1997) 21

Ruckelshaus v. Sierra Club, 463 U.S. 680 (1983) 20

*Sablan v. Department of Finance, of the
Commonwealth of the Northern
Mariana Islands*, 856 F.2d 1317
(9th Cir. 1988) 32

State of New Hampshire v. Adams,
159 F.3d 680 (1st Cir. 1998) 35

S-1 and S-2 v. State Board of Education,
21 F.3d 49 (4th Cir.)(en banc), *cert. denied*, 513 U.S. 876 (1994) ..... *passim*

S-1 and S-2 v. State Board of Education,
6 F.3d 160 (4th Cir. 1993) 32

Texas State Teachers Association v. Garland Independent School District, 489 U.S. 782 (1989) 16,18,27,31

Williams v. Hanover Housing Authority,
113 F.3d 1294 (1st. Cir. 1997) 40

Zinn by Blankenship v. Shalala, 35 F.3d 273
(7th Cir. 1994) 36,37

FEDERAL STATUTES

Federal Fair Housing Amendments Act of 1988 (FHAA),
42 U.S.C. §§ 3601, *et seq.* i,1

42 U.S. §§ 3612(c)(1) 19

42 U.S.C. § 3612(c)(2) 1,19, 21

The Americans with Disabilities Act of 1990,
42 U.S.C. §§ 12132, 12182 ..... i,1

42 U.S.C. § 12133 19

42 U.S.C. § 12205 ..... 1,19, 21

Title VII of the Civil Rights Act of 1964
42 U.S.C. §§ 2000e, *et seq.* 21

42 U.S.C. §§ 2000e-5(k) 22

Title II of the Civil Rights Act of 1964
42 U.S.C. §§ 2000a-3b 14

Civil Rights Attorney's Fees Awards Act of 1976
42 U.S.C. § 1988 ..... *passim*

Supreme Court Case Selections Act
28 U.S.C. § 1254(1) 1

Clean Water Act
33 U.S.C. §§ 1251, *et seq.* 27

STATE STATUTES

W. Va. Code § 16-5C-2(f) 2

W. Va. Code § 16-5C-12 4

W. Va. Code §§ 16-5H-1, *et seq.* 8

W. Va. Code §16-5H-2(f) (later 16-5H-2(j)) 2

W. Va. Code §§ 29A-3-1, *et seq.* 8

W. Va. Code §§ 29A-3-11 and 12 8

STATE REGULATIONS

C.S.R. §§ 64-65-3, 3.14 (later C.S.R.
64-65-3, 3.36) 2

State Fire Code, C.S.R. §§ 87-1-1,*et seq.* 8

C.S.R. §§ 87-1-14, 14.7 2

LEGISLATIVE HISTORY

H.R. Rep. No. 1558, 94th Cong.,
2d Sess. (1976) 15,18,23,27

S. Rep. No. 1011, 94th Cong.,
2d Sess. (1976) 15,18,23,26,27,34

H.R. Rep. No. 711, 100th Cong.,
2d Sess. (1988) 19,20

H.R. Rep. No. 485(II), 101st Cong.
2d Sess. (1990) 20

H.R. Rep. No. 485 (III), 101st Cong.,
2d Sess. (1990) 20

MISCELLANEOUS

Vol. 2, M. Schwartz & J. Kirlin, Section
1983 Litigation, Statutory
Attorney's Fees, (3rd. ed. 1997) 31,41

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Fourth Circuit is dated January 20, 2000, Petitioners' Appendix ("Pet. App.") at A4. The unreported opinion of Chief Judge Frederick P. Stamp, Jr., United States District Court for the Northern District of West Virginia is dated January 29, 1999. Pet. App. A9.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit entered judgment on January 20, 2000. A Petition for Rehearing and Petition for Rehearing *En Banc* was denied February 15, 2000.Pet. App. A1. The Petition for a Writ of Certiorari was filed on May 15, 2000. The Petition was granted on September 26, 2000. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This civil action arises under the FHAA, 42 U.S.C. §§ 3601, *et seq.*, and Titles II and III of the ADA, 42 U.S.C. §§ 12132 and 12182. The FHAA provides that "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs." 42 U.S.C. § 3613(c)(2). Pet. App. A21. The ADA similarly provides that a "court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee." 42 U.S.C. § 12205. Pet. App. A24.

STATEMENT OF THE CASE

A. Background facts.

On October 18, 1996, Sandra Daubman, Program Manager for the Office of Health Facility Licensure and Certification (OHFLAC), issued three Cease and Desist Orders forcing petitioner Buckhannon Board and Care Home (BBCH) to close its residential care homes within thirty days for want of compliance with the state's self-preservation rules. The orders banned BBCH, in its last thirty days of operation, from accepting new residents and commanded BBCH to expel Dorsey Pierce and all other residents. (JA 46-55).

BBCH provides residents with a home-like environment, more comfortable than living in an institutional setting such as a nursing home. (Stipulation Exhibit 1, 11/15/96 Tr. at 113). The residents at BBCH do not need any special care such as nursing care, and they pay for their own care. (*Id.* at p. 111). It is undisputed that, at the time the Cease and Desist Orders were issued, BBCH complied with all OHFLAC rules and the State Fire Code, except the self-preservation rules. (*Id.* at 53, 115-16). The self-preservation rules required all persons residing in a residential care home to have the ability, without assistance, to evacuate their homes in the event of an imminent danger such as a fire. W. Va. Code §§ 16-5C-2(f), 16-5H-2(f) (later 16-5H-2(j)); C.S.R. 64-65-3, 3.14 (later C.S.R. 64-65-3, 3.36); C.S.R. 87-1-14, 14.7.

In 1996, BBCH had three residents who were not capable of self-preservation, including Plaintiff Dorsey Pierce (*Id.* at 124). At that time, Ms. Pierce was an alert woman of 102 years who had lived for four years at BBCH in Buckhannon, West Virginia. (*Id.* at 69).[1] The home was four short blocks from her daughter's home and Ms. Pierce's son-in-law, Robert C. Marple, testified that he was very happy with the excellent care his mother-in-law received at BBCH and that it would be traumatic for her to be forced to move. (*Id.* at 70-71). The Cease and Desist Orders were designed to force Ms. Pierce and others to leave BBCH because they could not evacuate the homes without assistance.

On October 28, 1996, BBCH, the Residential Board and Care Association, Dorsey Pierce, and a group of similarly situated homes and residents filed a law suit against the Defendants, including the State of West Virginia, two state agencies, and eighteen individuals. The Plaintiffs' Complaint and Amended Complaint challenged the Cease and Desist Orders and the self-preservation rules as contrary to the FHAA and Titles II and III of the ADA. (JA 22,67).

On November 1, 1996, a hearing on Plaintiffs' Motion for a Temporary Restraining Order was held before Chief

---

[1] Ms. Pierce continued to live at BBCH until the age of 105, when she died on January 3, 1999. The parties have stipulated to the dismissal of the writ of certiorari only as to Ms. Pierce, since she was mistakenly designated a party in the Petition.

Judge Frederick P. Stamp, Jr. for the Northern District of West Virginia. At the hearing, the parties stipulated to the entry of an Agreed Order staying the enforcement of the Cease and Desist Orders pending resolution of the validity of the self-preservation rules. (Docket No. 9, entered on November 7, 1996).[2]

B. The underlying fire safety issue.

The case before the District Court pitted the concept of "aging in place" in a residential care home setting against the fire safety concerns of the State. That issue was not unique to West Virginia. The debate started on a national level when the National Fire Protection Association (NFPA) developed its 1985 Life Safety Code, to address the fire safety needs of residential care homes. (Stipulation Exhibit 2, Ex. 2). The Plaintiffs retained the services of several national experts in fire safety for residential care homes, including Dr. Bernard Levin, a former government employee at the National Bureau of Standards. Dr. Levin, using his expertise in fire safety and psychology, had helped develop the nation's first flexible fire safety standards for residential care homes.

---

[2] The Agreed Order initially provided for a stay of the Cease and Desist Orders "pending resolution of the administrative appeal available pursuant to W. Va. Code § 16-5C-12." *Id.* As Chief Judge Stamp's February 19, 1998, order denying the Motion to Dismiss recognized, the stay continued after that because the administrative opinion was appealed to circuit court and that matter was then stayed pending the District Court's final decision. (JA 119).

Dr. Levin testified that, when he started his work twenty years earlier, all states had self-preservation requirements for residential care homes. (Stipulation Exhibit 6, Levin depo. at p. 62). It was his goal in developing new provisions on residential care homes to avoid any reference to the concept of self-preservation because:

> We were trying to avoid requiring people to be in an institutional-like setting with its costs and other deficits just because somebody could not be certified as capable of self-preservation, a term which had no definition. (*Id.*).

To achieve this goal, he proposed a flexible approach to fire safety that looked to several factors at residential care homes, not just the ability of a resident to evacuate the premises without assistance. (*Id.* at 41). To achieve this goal, he placed all facilities into three categories for evacuation capability as prompt, slow, and impractical. Once a facility and its residents were evaluated under these three approaches, the fire safety parameters for that facility could be devised on an individualized basis.

Dr. Levin's proposals for residential care homes were ultimately accepted in the 1985 NFPA Life Safety Code. Dr. Levin went on to testify that, after he left the government, he performed a survey for the National Institute of Standards and Technology. His survey determined that a majority of states had abandoned the concept of self-preservation for residential

care homes, and adopted the flexible approach he created in the 1985 NFPA Life Safety Code. (*Id.* at 64).

State Fire Marshal Smittle testified in his March 11, 1997, deposition that he had been philosophically opposed to the NFPA Life Safety Code provisions pertaining to residential care homes since 1985 and he had voted against them when they were promulgated by the NFPA. (Stipulation Exhibit 5, Smittle depo. at pp.23-28). He thought the rules pertaining to self-preservation were essential in a small rural state like West Virginia (*Id.*). And, based on this view, in the intervening eleven years, he had personally ensured, through his position as State Fire Marshal, that West Virginia's self-preservation rules were retained. This occurred even though both the State Fire Code and the NFPA Life Safety Code were updated on a triennial basis.

C. Procedural developments in the underlying lawsuit.

Between State Fire Marshal Smittle's deposition in March, 1997, and January, 1998, the parties completed discovery and submitted a voluminous stipulated record of six notebooks of transcripts and exhibits to the District Court, along with cross-motions for summary judgment. On February 19, 1998, the District Court denied the Defendants' Motions to Dismiss this lawsuit. The Defendants moved to dismiss on the merits, arguing that the Plaintiffs had failed to state a claim on which relief could be granted. In denying the motion, the

District Court held that the Plaintiffs had properly stated a claim for discrimination under the FHAA and a claim for discrimination under the ADA. (JA 102).

Sometime about February 24, 1998, it came to the attention of undersigned counsel that State Fire Marshal Smittle and the Fire Commission had initiated steps to repeal the self-preservation rules. (¶ 11, Affidavit of Counsel, JA 131). In particular, on April 30, 1997, State Fire Marshal Smittle advised the Fire Commission that he proposed amending the State Fire Code to be consistent with the newest version of the NFPA Life Safety Code. (Exhibit 1, Motion for Attorney's Fees, JA 126). This Fire Commission meeting occurred six weeks after his deposition. During that deposition, State Fire Marshal Smittle had opined that the NFPA Life Safety Code provisions related to residential care homes would not work in West Virginia.

On May 30, 1997, State Fire Marshal Smittle presented a revised State Fire Code to the Fire Commission, adopting for the first time the provisions of the NFPA Life Safety Code pertaining to residential care homes. (*Id.* at Exhibit 2). His proposal was a complete reversal from his long held opposition to these provisions. The proposed rules were placed on a fast track, because they were required to be filed with the Secretary of State's office and the Legislative Rule-Making Review

Committee by August 1, 1997, to be enacted in the West Virginia Legislature that year. (*Id.* at Exhibit 3).[3]

On or about February 24, 1998, undersigned counsel first learned of this development and advised counsel for the Defendants of the proposed new State Fire Code, of which he also had been unaware. (¶ 11, Affidavit of Counsel, JA 131). Thereafter, counsel for the Defendants further advised that OHFLAC had recently submitted a bill to the West Virginia Legislature to repeal its self-preservation provisions as well. (*Id.* at ¶ 12). Defendants then filed a Motion to Stay. (*See* Docket No. 63). On March 14, 1998, the West Virginia Legislature enacted the two bills repealing the self-preservation provisions challenged by the Plaintiffs.[4] Following the repeal, the Defendants moved to dismiss the Plaintiffs' lawsuit as moot. (*See* Docket Nos. 69 and 70).

---

[3] An administrative agency in West Virginia has no independent legal authority to promulgate rules. Pursuant to W. Va. Code §§ 29A-3-1, *et seq.*, an agency may promulgate proposed rules, but they do not become final rules until they are approved by the Legislative Rule-Making Review Committee and enacted by the Legislature. W. Va. Code §§ 29A-3-11 and 12. Although the Legislature may amend the rules, particularly to clean up any mistakes, the vast majority of the rules proposed by agencies are approved with little discussion or amendment.

[4] The West Virginia Legislature enacted House Bill 4200, related to amendments to the State Fire Code, C.S.R. §§ 87-1-1, *et seq.* and Senate Bill 627, related to the self-preservation provisions in W.Va. Code §§ 16-5H-1, *et seq.* (JA 123).

D. The Motion for Attorney's Fees.

On June 4, 1998, Plaintiffs moved for an award of attorney's fees on grounds that they had prevailed in their lawsuit and obtained the exact relief sought - elimination of the self-preservation rules. Believing their challenge led to the abolition of the rules, Plaintiffs applied for reasonable attorney's fees under the catalyst theory. The foundation for the request lay in the fact that there was a material change in the relationship between the parties. At the beginning of the lawsuit, the Defendants sought the closure of BBCH and the eviction of Ms. Pierce and all other residents. (JA 46-55). In the end, the Plaintiffs obtained all the relief that they sought in the first instance. BBCH never closed. Dorsey Pierce and other residents were never evicted from BBCH. And most significantly, no other elderly residents in West Virginia now fear that they could be ordered out of their homes as a result of these abandoned rules.

The Plaintiffs argued before the district court that, based on the chronology of events in this case, there was a causal connection between their suit and the Defendants' efforts to abolish the self-preservation rules. Plaintiffs highlighted that State Fire Marshal Smittle had long been philosophically opposed to the provisions of the NFPA Life Safety Code related to residential care homes. Smittle and the other Defendants had therefore vigorously fought the litigation every

step of the way. No Defendant ever gave any indication of a willingness to settle or withdraw the self-preservation rules.[5]

Plaintiffs argued that Defendant Fire Marshal Smittle's decision to amend the rules to delete the self-preservation requirement at the May 30, 1997, State Fire Commission meeting was no mere coincidence. Likewise, the decision of OHFLAC to introduce Senate Bill 627 on February 20, 1998, after the district court held on February 19, 1998, that the complaint stated a claim under the FHAA and the ADA was motivated by the Plaintiffs' lawsuit. The Plaintiffs' lawsuit and persuasive expert discovery convinced the Defendants that the self-preservation rules were based on outmoded stereotypes of disabled persons and violated federal law. Thus, Plaintiffs established that their suit against the Defendants catalyzed repeal of the self-preservation rules.

On January 29, 1999, Chief Judge Stamp dismissed the Plaintiffs' lawsuit as moot and denied the fee request. The court explained that the "'catalyst theory' deems a plaintiff to have prevailed when he or she obtains some portion of the relief originally sought through a defendant's voluntary conduct, even though no formal judgment in his or her favor has been rendered. *Were this argument viable, plaintiffs might prevail on this theory.*" (Pet. App. A17)(emphasis added).

---

[5] As undersigned counsel has attested, an attempt was made to settle this matter at State Fire Marshal Smittle's deposition and it was soundly rebuffed. Thereafter, no further negotiations were attempted. (¶ 10, Affidavit of Counsel, JA 131).

However, the district court denied the fee request on the ground that the Fourth Circuit had rejected the catalyst theory in *S-1 and S-2*.

The District Court nevertheless ordered the parties, *sua sponte,* to brief the issue of sanctions under Rule 11, Federal Rules of Civil Procedure, as a result of the bad faith conduct of the State Fire Marshall's Office in allowing the parties to continue to litigate once the decision had been made to amend the self-preservation rules. (Pet. App. A19).[6]

The Fourth Circuit affirmed the district court's order on the basis of its prior *en banc* decision in *S-1 and S-2* that an attorney's fees award could not be made under the catalyst theory.

---

[6] Chief Judge Stamp also rejected the Plaintiffs' argument for attorney's fees under the "bad faith exception" concluding that, despite Plaintiffs "very strong argument," the conduct did not "quite rise, or sink" to the level of bad faith required to warrant an award under that exception. (Pet. App. A19). With regard to Rule 11, on April 22, 1999, sanctions were imposed upon the State Fire Marshall's office in the amount of $3,252.00. In so holding, the District Court stated (JA 147):

> This Court finds that as a state agency and an officer of a state agency, defendants should have been aware of the nature of this litigation. Further, because the "self-preservation" requirement was the root of this case, that defendants could not have known that its deletion would affect this litigation is doubtful, at best.

The amount of the fine related to the cost of briefing the Rule 11 issue, not the case as a whole.

SUMMARY OF ARGUMENT

This case presents the question whether a civil rights plaintiff, whose lawsuit catalyzes a defendant into making changes consistent with the relief requested, is a prevailing party, even though the action is dismissed as moot. For over thirty years, federal courts have awarded attorney's fees to civil rights plaintiffs under the catalyst theory. They have considered the party to have prevailed if there was a material alteration of the legal relationship between the parties that was caused by the lawsuit and the lawsuit was not frivolous, unreasonable, or groundless.

The Fourth Circuit in *S-1 and S-2 v. State Board of Education*, 21 F.3d 49, 51 (4th Cir.)(en banc), *cert. denied*, 513 U.S. 876 (1994), held that this Court's decision in *Farrar v. Hobby*, 506 U.S. 103, 111 (1992), limited the term "prevailing party" to one who achieves a judgment, settlement, or consent order. On this basis, the Fourth Circuit concluded that an award of attorney's fees may not be made to a party under the catalyst theory. The district court followed *S-1 and S-2* in this case and refused to consider the Plaintiffs' request for attorney's fees.

Congress enacted fee shifting statutes to vindicate civil rights legislation. The catalyst theory is consistent with the term "prevailing party" as used in the attorney's fee provisions of the ADA and FHAA and it was specifically endorsed by Congress when it enacted the Civil Rights Attorney's Fees Act

of 1976, 42 U.S.C. § 1988. The catalyst theory is further consistent with this Court's prior decisions regarding the term "prevailing party" which hold that a plaintiff need not litigate a case to judgment to obtain fees if the plaintiff achieves a portion of what she sought in the lawsuit. E.g. *Maher v. Gagne*, 448 U.S. 122 (1980); *Hewitt v. Helms*, 482 U.S. 755 (1987). This Court should now reverse the Fourth Circuit's ruling in this case and remand this case to the district court for consideration of the Plaintiffs' request for attorney's fees under the catalyst theory.

ARGUMENT

I. CIVIL RIGHTS PLAINTIFFS THAT ARE PREVAILING PARTIES ARE ENTITLED TO THEIR ATTORNEY'S FEES.

A. Congress intended private enforcement of civil rights laws.

Congress has enacted a variety of civil rights laws intending that enforcement of those laws would depend, in part, on "private attorneys general."[7] In *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968) (per curiam), this Court

---

[7] Congress has enacted over 100 federal fee shifting statutes that allow an attorney's fee award to be made to a prevailing party. *See Marek v. Chesney*, 473 U.S. 1, 43-51 (1985)(appendix to dissenting opinion of Brennan, J.).

recognized that, absent special circumstances, attorney's fees should be awarded to a prevailing party in actions under Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-3(b). The Court stated (*Id.* at 401-402):

> When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law. * * * If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. Congress therefore enacted the provision for counsel fees - not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, to encourage individuals injured by racial discrimination to seek judicial relief under Title II. [footnotes omitted].

This Court extended its attorney's fee ruling in *Newman* to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k), in *Albemarle Paper Company v. Moody*, 422 U.S. 405, 415 (1975).

Thereafter, this Court further examined the issue of attorney's fees for private attorneys general in *Aleyska Pipeline Service Company v. Wilderness Society*, 421 U.S. 240 (1975). In that decision, this Court held that no common law authority existed to award attorney's fees to private attorneys general or any other litigant absent express legislation by Congress (*Id.* at 263). This Court's decision in *Aleyska Pipeline* quickly led to Congress enacting the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988. This Act provided for an award of attorney's fees in additional enumerated civil rights cases.

The House and Senate Reports accompanying the Act demonstrate continued congressional encouragement of enforcement of a variety of civil rights laws by private attorneys general. The House Judiciary Committee emphasized this point by stating "[t]he effective enforcement of Federal civil rights statutes depends largely on the efforts of private citizens." H.R. Rep. No. 1558, 94th Cong., 2d Sess. 1 (1976). The Committee explained that private citizens can correct injustices by resorting to court and by receiving a "judicial remedy [that] is full and complete," including attorney's fees. *Id.* The Senate Judiciary Committee also recognized this point stating (S. Rep. No. 1011, 94th Cong., 2d Sess. 2 (1976)):

> The purpose and effect of S. 2278 are simple - it is designed to allow courts to provide the familiar remedy of reasonable counsel fees to prevailing parties in suits to enforce the civil rights acts which Congress has passed since

> 1866. * * * All of these civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain.

This Court acknowledged this legislative history at length in *City of Riverside v. Rivera*, 477 U.S. 561 (1986), and rejected any proportionality test that could limit a fee award to the size of the plaintiff's damage award. This Court further recognized that Congress encouraged private parties to enforce civil rights laws because both the litigant and the public as a whole are vindicated every time the law is enforced.

B. Prevailing parties are entitled to attorney's fees under federal fee shifting statutes.

The first step this Court takes in determining whether an award of attorney's fees is appropriate in any civil rights case is to examine whether the party "crossed the 'statutory threshold' of prevailing party status." *Texas State Teachers Association v. Garland Independent School District*, 489 U.S. 782, 789 (1989). This Court has further explained that this is a "generous formulation" and that, if the plaintiff succeeds "on any significant issue in litigation which achieves some of the benefit the parties sought in bringing the suit" then he is a

prevailing party. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983).[8]

This Court has outlined the contours of prevailing party status in a variety of contexts, concluding that each of the following are prevailing parties: a party who achieves only a nominal award of damages, *Farrar v. Hobby*, 506 U.S. 103 (1992); a party who prevailed upon some but not all of his claims, *Hensley, supra,* and *Garland, supra*; and, a party that achieves a favorable settlement. *Maher v. Gagne*, 448 U.S. 122 (1980). Alternatively, this Court has concluded that the following are not prevailing parties: a party whose case becomes moot for reasons unrelated to the pending litigation and who obtained no relief, *Hewitt v. Helms*, 482 U.S. 755 (1987), and *Rhodes v. Stewart*, 488 U.S. 1 (1988)(*per curiam*);

---

[8] In *Hensley, supra,* this Court concluded that there is "no precise rule or formula" for making fee determinations when the plaintiff achieved only limited success on the asserted claims for relief. 461 U.S. at 436. This Court explained (*Id.* at 433):

> A plaintiff must be a 'prevailing party' to recover an attorney's fee under § 1988. The standard for making this threshold determination has been framed in various ways. A typical formulation is that 'plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.' *Nadeau v. Helgemoe*, 581 F.2d 275, 278-279 (CA1 1978). This is a generous formulation that brings the plaintiff only across the statutory threshold. It remains for the district court to determine what fee is 'reasonable.' [footnotes omitted].

and, a party that obtained a reversal of a directed verdict against him and a remand for a new trial on appeal, but had not yet prevailed on the merits or obtained any actual relief, *Hanrahan v. Hampton*, 446 U.S. 754 (1980) (*per curiam*).

In reaching these decisions, this Court carefully examined the legislative history of § 1988 to determine what Congress meant by the term "prevailing party." In *Hanrahan, supra*, this Court reviewed that legislative history and quoted from H.R. Rep. No. 1558, 94th Cong., 2d Sess. 7 (1976) that "a person may in some circumstances be a 'prevailing party' without having obtained a favorable 'final judgment following a full trial on the merits.'" *Id.* at 756-57. This Court also relied on the Senate Report, citing S. Rep. No. 1011, 94th Cong., 2d Sess. 5 (1976), which explained that "parties may be considered to have prevailed when they vindicate rights through a consent judgment *or without formally obtaining relief,*" (emphasis added). *Id.* at 757. Similar reasoning appears in *Garland, Hensley,* and *Maher, supra*.

This Court's cases addressing the term "prevailing party," have common elements - in order for a party to be considered prevailing, it must have achieved some relief and it must have benefitted from that relief. These elements exist when a case is settled. They similarly exist when a case is rendered moot as a result of the plaintiff catalyzing the defendant into making changes consistent with the relief requested by the plaintiff. In both instances, the plaintiff has

prevailed without "formally obtaining relief." In both cases the plaintiff is entitled to reasonable fees.

C. Prevailing parties under the ADA and FHAA are entitled to attorney's fees.

Both the ADA and the FHAA contain enforcement provisions allowing private citizens a full range of equitable relief, compensatory and punitive damages. 42 U.S. §§ 3612(c)(1) and 12133. These provisions compensate individuals harmed by unlawful discrimination and deter discrimination in the first place. *See, e.g.*, H.R. Rep. No. 711, 100th Cong., 2d Sess. 39-40 (1988) (FHAA lifted limit on punitive damages to provide incentives to bring private enforcement actions and to deter wrongful discrimination). Congress also enacted fee shifting provisions in both statutes. The FHAA provides that "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs" 42 U.S.C. § 3612(c)(2), Pet. App. A21. The ADA provides that a "court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee." 42 U.S.C. § 12205, Pet. App. A24.

The legislative history of both Acts reveals that Congress intended these two provisions to be construed like other prevailing party statutes. In 1988, Congress amended the attorney's fee provisions of the Fair Housing Act, so that the "attorney's fee language in Title VIII [is] closer to the model

used in other civil rights laws," in particular, the Civil Rights Attorney's Fees Act, 42 U.S.C. § 1988. H.R. Rep. No. 711, 100th Cong., 2d Sess. 16 n.20, 17 (1988). Congress further recognized that the amendments were aimed at correcting a lack of enforcement because of "disadvantageous limitations on punitive damages and attorney's fees" in the then-current version of the Fair Housing Act. *Id.* at 16. Congress likewise indicated, in 1990, that it enacted the attorney's fee provisions of the ADA so "that the term 'prevailing party' [would] be interpreted consistently with other civil rights laws." H.R. Rep. No. 485 (II), 101st Cong. 2d Sess. 140 (1990). *See also* H.R. Rep. No. 485 (III), 101st Cong., 2d Sess. 73 (1990) (ADA's attorney's fee provision should be interpreted the same as 42 U.S.C. § 1988, including the interpretation of prevailing party).

Although this Court has not had occasion to consider the definition of a prevailing party under the ADA or the FHA, it has generally held that the term prevailing party is to be interpreted *pari passu* and read identically in all fee shifting statutes. *See e.g. Ruckelshaus v. Sierra Club*, 463 U.S. 680, 691-92 (1983); *Hensley v. Eckerhart*, 461 U.S. 424, 433 n.7 (1983); *Northcross v. Board of Education of Memphis City Schools*, 412 U.S. 427, 428 (1973). Therefore, this Court's decisions interpreting the term prevailing party under § 1988

should apply equally to that term under the FHAA and the ADA.[9]

II. ATTORNEY'S FEES MAY BE AWARDED UNDER THE CATALYST THEORY IN CIVIL RIGHTS CASES.

A. The Eighth Circuit originated the catalyst theory thirty years ago.

The catalyst theory has been accepted in the federal courts for awarding attorney's fees to prevailing parties in civil rights cases for over thirty years. It was first recognized by the Court of Appeals for the Eighth Circuit in *Parham v. Southwestern Bell Telephone Co.*, 433 F.2d 421 (8th Cir. 1970).

---

[9] Several Courts of Appeals have considered how to interpret the term prevailing party under the FHAA and the ADA. They have uniformly concluded that the fee provisions are substantially similar to the attorney's fees provisions under Title VII, 42 U.S.C. §§ 2000e, *et seq.* and § 1988. *E.g., Paris v. United States Dept. of Housing & Urban Development*, 988 F.2d 236 (1st Cir. 1993) (application for attorney's fees arising under 42 U.S.C. § 3613(c)(2) and §1988 treated the same with regard to prevailing party analysis); *Pottgen v. Missouri State High School Activities Association*, 103 F.3d 720, 723 (8th Cir. 1997) (application for attorney's fees arising under 42 U.S.C. § 12205 is treated the same for prevailing party as a claim arising under §1988); *Oxford House-A v. City of University City*, 87 F.3d 1022, 1024 (8th Cir. 1996) (application for attorney's fees arising under 42 U.S.C. § 3613(c)(2) is treated the same for a prevailing party as a claim arising under Title VII or § 1988); *Roe v. Cheyenne Mountain Conference Resort, Inc.*, 124 F.3d 1221, 1232 (10th Cir. 1997) (application for attorney's fees arising under 42 U.S.C. § 12205 is treated the same for a prevailing party as a claim arising under Title VII or § 1988).

Parham arose under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k), in a case where the district court dismissed the complaint, without awarding the individual plaintiff any monetary judgment or the class any injunctive relief. The Court of Appeals upheld dismissal, but further held (*Id.* at 429-30):

> Although we find no injunction warranted here, we believe Parham's lawsuit acted as a *catalyst* which prompted the appellee to take action implementing its own fair employment policies and seeking compliance with the requirements of Title VII. In this sense, Parham performed a valuable public service in bringing this action. Having prevailed in his contentions of racial discrimination against blacks generally prior to February, 1967, Parham is entitled to reasonable attorney's fees, including services for this appeal, to be allowed by the district court as authorized by 42 U.S.C. § 2000e-5(k). [emphasis added].

In *Parham*, the Court of Appeals considered the plaintiff to have crossed the "statutory threshold" as a prevailing party, even though he did not obtain a judgment or a settlement, because he had acted as a catalyst in abating racial discrimination through his lawsuit. The Court determined that it was the plaintiff's lawsuit that catalyzed the employer to hire more African-Americans and therefore he was entitled to fees.

The Court further explained that the lawsuit benefitted the public and thus achieved the congressional goal of vindicating the Civil Rights Act of 1964.

B. Congress incorporated the catalyst theory into the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988.

The decision in *Parham* is also significant because it is relied upon and cited by both the House and Senate Reports in the enactment of the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988. Citation by both reports to *Parham* demonstrates express recognition by Congress that a prevailing party may be one who catalyzes a defendant into action. The Senate Report, No. 1011, 94th Cong., 2d Sess. at 5 (1976), states:

> for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief. *Kopet v. Esquire Realty Co.* 523 F.2d 1005 (2d Cir. 1975), and cases cited therein; *Parham v. Southwestern Bell Telephone Co.*, 433 F.2d 421 (8th Cir. 1970); * * *

The House Report, No. 1558, 94th Cong., 2d Sess. at 7 (1976), also states:

> Similarly, after a complaint is filed a defendant might voluntarily cease the unlawful practice. A court might still award fees even though it might conclude, as a matter of equity that no formal relief, such as an injunction, is needed. *E.g. Parham v. Southwestern Bell Telephone*, 433 F.2d 421 (8th Cir. 1970); *Brown v. Gaston County Dyeing Machine Co.*, 457 F.2d 1377 (4th Cir.) *cert denied*, 409 U.S. 982 (1972).
> * * *

In citing to *Parham* and *Brown*, Congress expressly recognized that one is a prevailing party when a lawsuit catalyzes a defendant into making changes consistent with the relief requested by the plaintiff, even though the lawsuit is dismissed as moot.[10] Rewarding litigants under the catalyst theory in such cases is consistent with the congressional goal of encouraging private enforcement of civil rights laws.

---

[10] *Brown* is also a race discrimination case where the named plaintiff was not entitled to any final relief. Ultimately, the Court of Appeals held that the class was not entitled to relief because the employer had made great strides in hiring African-American employees after the lawsuit was filed. Despite no final relief for the class and the named plaintiff, the Fourth Circuit followed *Parham* and held an award of attorney's fees was appropriate. 457 F.2d at 1383.

C. This Court has recognized that Congress intended to allow the catalyst theory under the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988.

Hewitt, Maher, and *Hanrahan, supra,* strongly support an award of attorney's fees under the catalyst theory. In *Hewitt, supra*, this Court reversed an award of attorney's fees to a plaintiff inmate who received no damages, injunctive relief, or declaratory judgment. However, it emphasized that (482 U.S. at 760-761):

> It is settled law, of course, that relief need not be judicially decreed in order to justify a fee award under § 1988. A lawsuit sometimes produces voluntary action by the defendant that affords the plaintiff all or some of the relief he sought through a judgment - *e.g.*, a monetary settlement or a change in conduct that redresses the plaintiff's grievances. When that occurs, the plaintiff is deemed to have prevailed despite the absence of a formal judgment in his favor. See *Maher, supra*, 448 U.S., at 129.

The Court explained that the lower court's holding that the plaintiff's disciplinary proceeding was unconstitutional was insufficient because that finding had not *"affect[ed] the behavior of the defendant towards the plaintiff"* (emphasis in original). 482 U.S. at 761. In contrast, if "the defendant, under

the pressure of the lawsuit, pays over a money claim before the judicial judgment is pronounced" or "alters his conduct (or threatened conduct) towards the plaintiff that was the basis for the suit," then "the plaintiff will have prevailed." *Id.* Ultimately, this Court stated in *Hewitt, supra*, that it would not limit the "outer boundaries" of the term prevailing party to preclude an award of attorney's fees under the catalyst theory. 482 U.S. at 759 and 763.[11]

This Court further recognized the catalyst theory in *Maher, supra*, when it held that a party who obtained a settlement would be considered a prevailing party under § 1988. The Court resolved the issue with little discussion, holding that "[t]he fact that respondent prevailed through a settlement rather than through litigation does not weaken her claim to fees." 488 U.S. at 129. The Court relied on Senate Report No. 1011, 94th Cong., 2d Sess. at 5 (1976), which said that fees are available when parties "vindicate rights through a consent judgment or without formally obtaining relief." *Id.*

Finally, in *Hanrahan, supra*, this Court reviewed the legislative history of § 1988 and explained that "a person may in some circumstances be a 'prevailing party' without having obtained a favorable 'final judgment following a full trial on the

---

[11] This Court in *Hewitt* did not award attorney's fees to the plaintiff under the catalyst theory because he was no longer incarcerated. Therefore, he did not prevail, since he did not personally benefit from the change in regulations that may have resulted from his lawsuit. 482 U.S. at 763-764.

merits'" and "parties may be considered to have prevailed when they vindicate rights through a consent judgment *or without formally obtaining relief,*" *Id.* at 756-57 (emphasis added) (quoting H.R. Rep. No. 1558, 94th Cong., 2d Sess. 7 (1976), and citing S. Rep. No. 1011, 94th Cong., 2d Sess. 5 (1976)).[12]

Prior to *Farrar v. Hobby*, 506 U.S. 103 (1992), this Court said it was "settled law" that a plaintiff has prevailed for purposes of attorney's fees when, in the absence of a court order or a settlement, a voluntary change in a defendant's conduct as a result of a lawsuit has redressed the plaintiff's grievances. *Hewitt,* 482 U.S. at 760-761. The Court identified the touchstone in a claim for attorney's fees as whether there had been a "material alteration in the legal relationship of the parties." *Garland*, 489 U.S. at 792-93. If a party achieved a favorable result from the lawsuit, it had crossed the "statutory

---

[12] *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987), provides additional support for this Court's recognition of the catalyst theory. In *Gwaltney,* this Court asked whether a civil action could be filed under the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*, for wholly past violations. In holding that past violations were not actionable, this Court explained that plaintiffs should not be concerned that a case could later be mooted by a defendant's subsequent compliance with the Act because (*Id.* at 67, n.6):

> The legislative history of [33 U.S.C. § 1365(d)] states explicitly that the award of costs "should extend to plaintiffs in actions which result in successful abatement but do not reach a verdict. For instance, if as a result of a citizen proceeding and before a verdict is issued, a defendant abated a violation, the court may award litigation expenses borne by the plaintiffs in prosecuting such actions." S. Rep. No. 92-414, p. 81 (1971).

threshold" as a prevailing party, and was entitled to reasonable attorney's fees. *Hensley*, 461 U.S. at 431.

D. This Court's decision in *Farrar* does not address the catalyst theory.

In *Farrar*, this Court held that a civil rights plaintiff who obtains a judgment of nominal damages is a prevailing party. This Court also affirmed the decision of the Court of Appeals that it was unreasonable under the facts in that case for the plaintiffs to receive an award of attorney's fees, since they only obtained a nominal judgment. However, this Court did not address the situation of a case that became moot because the plaintiff's case catalyzed defendant's actions. Instead, it discussed the nature of the relief that a plaintiff must receive to be a prevailing party for attorney's fees purposes. The Court explained (506 U.S. at 111):

> Whatever relief the plaintiff secures must directly benefit him at the time of the judgment or settlement. * * * Otherwise the judgment or settlement cannot be said to "affect the behavior of the defendant toward the plaintiff." [citation omitted].

The Court quoted *Hewitt* and *Maher* with approval. *Id.* So, nothing in *Farrar* limits the earlier discussion in those decisions. When, as here, a defendant modifies its behavior in response to a lawsuit, the lawsuit has "affected the behavior of

the defendant toward the plaintiff." Indeed, the Court has made clear that it is not a judgment itself that confers prevailing party status but a change in behavior by the defendant. In *Hewitt,* the Court stated that "[a]t the end of the rainbow lies not a judgment, but some action (or cessation of action) by the defendant that the judgment produces - the payment of damages, or some specific performance, or the termination of some conduct." 482 U.S. at 761.

This Court most recently examined *Farrar* in *Friends of the Earth, Inc., v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 120 S.Ct. 693 (2000). This Court emphatically stated that *Farrar* "involved no catalytic effect." *Id.* at __, 120 S.Ct. at 711. This Court further explained that a majority of Courts of Appeals had similarly considered the issue and they had reached the same conclusion (*Id.* at __, 120 S.Ct. at 711):

> Recognizing that the issue was not presented for this Court's decision in *Farrar*, several Courts of Appeals have expressly concluded that *Farrar* did not repudiate the catalyst theory. See *Marbley v. Bane*, 57 F. 3d 224, 234 (CA2 1995); *Baumgartner v. Harrisburg Housing Authority*, 21 F. 3d 541, 546-550 (CA3 1994); *Zinn v. Shalala*, 35 F. 3d 273, 276 (CA7 1994); *Little Rock School Dist. v. Pulaski County Special Sch. Dist., #1*, 17 F.3d 260, 263, n.2 (CA8 1994); *Kilgour v. Pasadena*, 53 F. 3d

> 1007, 1010 (CA9 1995); *Beard v. Teska*, 31 F. 3d 942, 951-952 (CA10 1994); *Morris v. West Palm Beach*, 194 F.3d 1203, 1207 (CA11 1999). Other Courts of Appeals have likewise continued to apply the catalyst theory notwithstanding *Farrar*. *Paris v. United States Dept. of Housing and Urban Development*, 988 F. 2d 236, 238 (CA1 1993); *Citizens Against Tax Waste v. Westerville City School*, 985 F. 2d 255, 257 (CA6 1993).

This Court ultimately decided that it was premature for it to decide whether attorney's fees could be awarded under the catalyst theory because it "is for the District Court, not this Court, to address in the first instance any request for reimbursement of costs, including fees." *Id.* at __, 120 S.Ct. at 712.

The Plaintiffs in this action properly moved for their attorney's fees under the catalyst theory in the district court. They were denied on grounds that such relief is never available. This Court should examine the statutes, congressional intent, prior decisions of this Court and determine that a civil rights plaintiff, whose lawsuit catalyzes the defendant to make changes consistent with the relief requested by the plaintiff, is a prevailing party entitled to attorney's fees under the catalyst theory.

III. COURTS OF APPEALS HAVE CONTINUED TO APPLY THE CATALYST THEORY IN CIVIL RIGHTS CASES.

A. Courts of Appeals have uniformly followed the catalyst theory for over thirty years.

Since 1970, numerous courts have relied upon *Parham* and this Court's explanation of the term "prevailing party" to award attorney's fees to plaintiffs in a wide variety of civil rights cases under the catalyst theory. *E.g., Nadeau v. Helgemoe*, 581 F.2d 275 (1st Cir. 1978);[13] *N.A.A.C.P. v. Wilmington Medical Center, Inc.*, 689 F.2d 1161 (3rd Cir. 1982); *Bonnes v. Long*, 599 F.2d 1316 (4th Cir. 1979); *Citizens Coalition for Block Grant Compliance, Inc. v. City of Euclid*,

---

[13] *Nadeau* is one of the leading decisions under the catalyst theory. *See* Vol. 2, § 2.11, M. Schwartz & J. Kirlin, Section 1983 Litigation, Statutory Attorney's Fees (3rd. ed. 1997). In *Nadeau*, the Court of Appeals adopted a two part test for the catalyst theory. First, *as a matter of fact*, were "the plaintiffs' suit and their attorney's efforts • • • a necessary and important factor in achieving the improvements."581 F.2d at 281. Second, *as a matter of law*, were the plaintiffs' claims not "frivolous, unreasonable, or groundless" under *Christiansburg Garment Co. v. E.E.O.C.*, 434 U.S. 412, 422 (1978). *Id.*

This Court has cited *Nadeau* and relied upon it in numerous decisions. *E.g., Farrar v. Hobby*, 506 U.S. 103, 109 (1992); *Texas State Teachers Association v. Garland Independent School District*, 489 U.S. 782, 789 (1989); *Hensley v. Eckhert*, 461 U.S. 424, 433 (1983); *Long v. Bonnes*, 455 U.S. 961, 966-67 (1982)(Chief Justice Rehnquist and Justice O'Connor, dissenting from denial of certiorari); *Hanrahan v. Hampton*, 446 U.S. 754, 758 (1980).

717 F.2d 964 (6th Cir. 1983); *Sablan v. Department of Finance, of the Commonwealth of the Northern Mariana Islands*, 856 F.2d 1317 (9th Cir. 1988); *Gurule v. Wilson*, 635 F.2d 782 (10th Cir. 1980).

These courts have generally recognized that it was consistent with congressional intent to award attorney's fees to a civil rights plaintiff whose lawsuit catalyzed the defendant into making changes consistent with the relief requested by the plaintiff, even though the case did not proceed to judgment because it became moot. This application of the term "prevailing party" continued unabated until this Court decided *Farrar v. Hobby*, 506 U.S. 103 (1992), and the Fourth Circuit determined that the catalyst theory was no longer a viable basis for an award of attorney's fees.

B. The Fourth Circuit erroneously determined that it could no longer consider the catalyst theory after *Farrar*.

After *Farrar*, a panel of the Fourth Circuit confronted an application for attorney's fees under the catalyst theory in *S-1 and S-2 v. State Board of Education*, 6 F.3d 160 (4th Cir. 1993). The majority concluded that this Court's decision in *Farrar* had not intended to reverse the long standing and important catalyst theory without addressing it "head-on." *Id.* at 166. It also discussed the other Supreme Court decisions that were consistent with the catalyst theory: *Hanrahan v. Hampton, supra; Hensley v. Eckerhart, supra; Kentucky v. Graham,* 473

U.S. 159, 165 n. 9 (1985); *Hewitt v. Helms, supra*. Finally, the majority acknowledged that other Courts of Appeals had continued to allow attorney's fees under the catalyst theory after *Farrar*. *E.g., Paris v. United States Dept. of Housing & Urban Development*, 988 F.2d 236 (1st Cir. 1993); *Citizens Against Tax Waste v. Westerville City School*, 985 F.2d 255 (6th Cir. 1993); *Craig v. Gregg County, Texas*, 988 F.2d 18 (5th Cir. 1993).

However, Chief Judge Wilkinson dissented from the majority's opinion, stating that "[t]here is no way, however, that *Farrar* and a broad 'catalyst theory' of attorneys' fees recovery can be reconciled." *Id.* at 168-69. His opinion was based upon his belief that this Court, in *Farrar,* intended to limit the term "prevailing party" exclusively to those who obtained an enforceable judgment, settlement or consent decree. He further articulated four reasons why no court should continue to recognize the catalyst theory. First, the theory conflicts with the plain language of § 1988. Second, the theory is in conflict with prior decisions of this Court. Third, the theory engenders confusion and unnecessary litigation. Fourth, the theory makes officials unwilling to take voluntary action and encourages frivolous litigation. *Id.* at 170-75.

Chief Judge Wilkinson's dissent was ultimately adopted as a *per curiam en banc* decision, *S-1 and S-2 v. State Board of Education*, 21 F.3d 49, 51 (4th Cir.) (*en banc*), *cert. denied*, 513 U.S. 876 (1994), by a seven to six vote.

The decision in *S-1 and S-2* is inconsistent with this Court's and other Courts of Appeals' decisions under the catalyst theory for the following reasons. First, § 1988 uses the term "prevailing party" and Congress recognized that "parties may be considered to have prevailed when they vindicate rights through a consent judgment *or without formally obtaining relief.*" S. Rep. No. 1011, 94th Cong., 2d Sess. 5 (1976) (emphasis added). Second, as discussed in this brief, this Court's prior decisions in *Hewitt, Hanrahan,* and *Hensley, supra,* allow the catalyst theory. Third, other Courts of Appeals have not had any problem applying the catalyst theory as they have recognized that the district courts are equipped with "factfinding expertise" to resolve the factual and legal issues that arise under the catalyst theory. *Baumgartner v. Harrisburg Housing Authority*, 21 F.3d 541, 548 (3d Cir. 1994); *Nadeau,* 581 F.2d at 281. The Third Circuit best articulated this view (21 F.3d at 548):

> [The defendant] argues that abrogation of the 'catalyst theory' will eliminate the additional litigation that may be created by the determination of whether a lawsuit was the actual 'catalyst.' However, the factual question is present in any determination of attorney's fees; while it may differ to some extent in a 'catalyst' case, that is merely a question of degree and one which the district courts, in their factfinding expertise, deal with on a regular basis.

Finally, the argument that the catalyst theory would be a disincentive to public officials to act is flawed, because it is even arguably true only with respect to non-meritorious cases where a final judgment would be for the defendant. By contrast, in meritorious cases, public officials will reduce their liability for fees by acting to moot the case, as continued litigation would only increase fees to which the plaintiff will ultimately be entitled. Thus, as the First Circuit observed in the related context of settlement, "the argument cuts both ways . . . We cannot decide this issue based on such honest but speculative concerns." *Nadeau*, 581 F.2d at 282.

From a policy perspective, if the Fourth Circuit's rule precluding the catalyst theory is allowed to stand, it will assure that fewer civil rights lawsuits will be brought. Lawyers will be more unwilling to take on expensive litigation, knowing that they can be deprived of their fees by the defendant's surrender on the eve of victory. Such a result would be contrary to Congress's intent to provide a means for ordinary citizens to privately enforce civil rights statutes.

C. All other Courts of Appeals have continued to follow the catalyst theory after *Farrar*.

All of the other Courts of Appeals that have examined *Farrar* and the continuing viability of the catalyst theory uniformly concluded that civil rights litigants may still recover their attorney's fees under that theory. *State of New Hampshire v. Adams*, 159 F.3d 680, 685 (1st Cir. 1998); *Marbley v. Bane*,

57 F.3d 224 (2nd Cir. 1994); *Baumgartner, supra,* at 545-550; *Craig, supra,* at 21; *Payne v. Board of Education, Cleveland City Schools*, 88 F.3d 392, 397 (6th Cir. 1996); *Zinn by Blankenship v. Shalala*, 35 F.3d 273, 274 (7th Cir. 1994); *Little Rock School District v. Special School District 1*, 17 F.3d 260, 262-263 (8th Cir. 1994); *Kilgour v. City of Pasadena*, 53 F.3d 1007, 1010 (9th Cir. 1995); *American Council of the Blind v. Romer*, 992 F.2d 249, 250-251 (10th Cir.), *cert. denied*, 510 U.S. 864, 114 S.Ct. 184 (1993); *Cullens v. Georgia. Department of Transportation*, 29 F.3d 1489, 1494-1495 (11th Cir. 1994); and, *Maduka v. Meissner*, 114 F.3d 1240, 1241 (D.C. Cir. 1997) (*per curiam*).[14]

Those Courts of Appeals that have carefully considered the *Farrar* decision have refused to extend its holding to preclude an award of attorney's fees under the catalyst theory for the following reasons. First, the theory was "settled law" and this Court would not overrule a well established rule *sub silenteo*. *Baumgartner* and *Zinn, supra*. Second, *Farrar* involved a plaintiff seeking substantial money damages who only received nominal damages, not a plaintiff seeking

---

[14] This Court in *Friends of the Earth, Inc., supra,* cited most of these Court of Appeals decisions to demonstrate that nothing in *Farrar* repudiated the catalyst theory. Also, in *Friends of the Earth*, the United States filed a brief in support of the Petitioners arguments for attorney's fees under the catalyst theory arguing that nothing in *Farrar* "repudiates the reasoning in *Hewitt* and *Maher*." Brief of the United States as Amicus Curiae Supporting Petitioners (U.S. No. 98-822) (filed May 17, 1999).

declaratory or injunctive relief whose action is rendered moot by the defendant's catalyzed conduct. *Marbley* and *Baumgartner, supra*. Third, *Farrar* involved a plaintiff who received a judgment on the merits, thus no issue related to the catalyst theory arose in that case. *Kilgour, supra*.

Further, several Courts of Appeals have specifically rejected the Fourth Circuit's reasoning in *S-1 and S-2*, concluding that the Fourth Circuit misread or misinterpreted *Farrar*. *E.g., Brown v. Local 58, International Brotherhood of Electrical Workers*, 76 F.3d 762, 772 n. 7 (6th Cir. 1996) (Fourth Circuit's reading of *Farrar* has been rejected by other circuits that have considered the issue); *Zinn, supra*, at 274 n. 4 (*Hewitt v. Helms* does allow the award of attorney's fees under the catalyst theory and *Farrar* does not provide otherwise); *Kilgour, supra,* at 1010 (*Farrar* not applicable because it involved recovery on the merits and the catalyst theory is an alternative theory); *Beard v. Teska*, 31 F.3d 942, 951 (10th Cir. 1994) (All the other circuits that have considered the issue continue to follow the catalyst theory).

The Second Circuit, in *Marbley, supra*, considered the issue of attorney's fees after *Farrar* and recognized the public policy behind awarding attorney's fees in civil rights cases as "an incentive for lawyers to accept these often time-consuming cases; limiting that recovery to 'prevailing parties' tends to filter out meritless cases." 57 F.3d at 233. The Second Circuit went on to conclude that the catalyst theory should still be followed as consistent with this Court's prevailing party

analysis, particularly the "generous formulation" standard in *Hensley, supra,* 461 U.S. at 433. It held that nothing in *Farrar* invalidated the catalyst theory because this Court's discussion of judgment or settlement (57 F.3d at 234):

> appears in the segment of the opinion that discusses the particular award in that case: a jury verdict resulting in a final judgment of nominal damages. Earlier in the opinion, the Court noted its "'generous formulation'" under which "'Petitioners may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which obtains some of the benefit the parties sought in bringing suit.'" *Id.* at ___, 113 S.Ct. at 572 (citation omitted). Consistent with this principle, most courts have - either expressly or implicitly - affirmed the continued viability of the 'catalyst' theory of recovery of attorney's fees.

The Eleventh Circuit in *Morris v. City of West Palm Beach*, 194 F.3d 1203, 1207 (11th Cir. 1999), also set forth reasons for the continuing viability of the catalyst theory after *Farrar*:

> While no Supreme Court case has ever affirmatively upheld the application of the catalyst test, the catalyst test accords well with

long-held notions of prevailing parties. *See Hewitt v. Helms*, 482 U.S. 755, 760- 61, 107 S.Ct. 2672, 2676, 96 L.Ed.2d 654 (1987). * * * Additionally, the question before the Court in *Farrar* addressed the *degree* of relief, rather than the *form* of relief, for the plaintiffs in *Farrar* had attained an enforceable judgment of nominal damages. 506 U.S. at 107, 113 S.Ct. at 570. The fact that the majority used broad language in discussing the question before it (i.e., whether an enforceable judgment of nominal damages can justify a fee award under § 1988) does not indicate how it would rule on the question of whether a showing that a plaintiff's lawsuit caused the defendant to act to remedy unconstitutional behavior can justify a fee award. *See Marbley*, 57 F.3d at 234; *Baumgartner*, 21 F.3d at 547-48.

The Eleventh Circuit went on to conclude that the catalyst theory "creates incentives for plaintiffs to initiate potentially meritorious civil rights cases" and therefore, "given the long history and the important policies undergirding the catalyst test," *Farrar* should not be read to eliminate the catalyst theory. *Id.*

This Court should now resolve the dispute between the Fourth Circuit and the rest of the nation regarding the contours of the term "prevailing party." This Court should hold that a

civil rights plaintiff should be awarded attorney's fees when its lawsuit catalyzes the defendant into making changes consistent with the relief requested by the plaintiff, even if the defendant's actions render the underlying case moot. This interpretation of the term prevailing party is consistent with congressional intent in enacting the statutes and encouraging private enforcement of civil rights laws.

IV. THE PLAINTIFFS IN THIS CASE ARE ENTITLED TO A REMAND SO THAT THE DISTRICT COURT CAN CONSIDER THEIR REQUEST FOR ATTORNEY'S FEES UNDER THE CATALYST THEORY.

A. This Court should apply the *Nadeau* test in allowing awards of attorney's fees under the catalyst theory.

If this Court agrees that attorney's fees may be awarded under the catalyst theory, it may want to consider the criteria under which fees should be awarded. The Plaintiffs urge this Court to adopt the *Nadeau* test commonly used by the Courts of Appeals to award attorney's fees in civil rights cases.[15] The

---

[15] Chief Justice Rehnquist and Justice O'Connor recognized that the two part test in *Nadeau*, was consistent with the intent of Congress in enacting § 1988 in their dissenting opinion from denial of certiorari in *Long v. Bonnes*, 455 U.S. 961, 966-67 (1982). A majority of Courts of Appeals have employed a two part test under *Nadeau*. *See, e.g., Williams v. Hanover Housing Authority,* 113 F.3d 1294, 1299-1300 (1st. Cir. 1997)

first part of that test is fact specific. It involves a determination of whether there was a material alteration of the legal relationship between the parties and whether there was a causal relationship between the civil action filed by the plaintiffs and the action of the defendants. In examining this first factor, the Court of Appeals in *Nadeau*, 581 F.2d at 275, stated:

> we consider the chronological sequence of events to be an important, although clearly not definitive factor, in determining whether or not defendant can be reasonably inferred to have guided his actions in response to plaintiff's lawsuit. This is particularly true where the evidence relevant to the causes of defendant's behavior is under defendant's control and not easily available to plaintiff.

(attorney's fees allowed under § 1988 and the two part *Nadeau* catalyst test since party caused HUD to change interpretation of law pertaining to portability policy); *Owner-Operator Independent Drivers Association, Inc. v. Bissell*, 210 F.3d 595 (6th Cir. 2000) (attorney's fees allowed under § 1988 and the two part *Nadeau* catalyst test since the party caused that state to abolish the PSC and the Commissioner to resign); *Doty v. County of Lassen*, 37 F.3d 540 (9th Cir. 1994) (attorney's fees allowed under § 1988 and the two part *Nadeau* catalyst test since party obtain preliminary injunction and caused certain prison reforms), *see also* Vol. 2, § 2.11, M. Schwartz & J. Kirlin, Section 1983 Litigation, Statutory Attorney's Fees, (3rd. ed. 1997). Some have broken *Nadeau*'s test into three parts. *See, Morris v. City of West Palm Beach, supra* (Eleventh Circuit applies a three part test to award attorneys fees under the catalyst theory).

The second part of that test is legal. It involves an examination of whether the claim was "frivolous, unreasonable or groundless." 581 at 281. In *Doty v. County of Lassen*, 37 F.3d 540, 548 (9th Cir. 1994), the Ninth Circuit discussed this second factor of the catalyst test, stating:

> Defendants contend that the second element of the * * * test requires the District Court to determine whether the relief was "required by the Constitution or federal law." Defendants are incorrect. The District Court correctly held that the * * * test requires only that the relief be related to a claim that is not frivolous, unreasonable or groundless. * * * This test sensibly keeps the District Court from having to address, during the attorney's fees litigation, the merits of resolved disputes to determine whether the relief obtained would have been obtainable by judgment. [citations omitted].

This Court should consider and adopt the *Nadeau* test. District Courts have applied the *Nadeau* test for over twenty years and they have substantial expertise in making the necessary factfinding in consideration of any fee request under the catalyst theory. The test is also consistent with the statutes and congressional intent regarding when a party may be considered a prevailing party. And by applying the second part of the *Nadeau* test, this Court can ensure that a request for fees

does not require an after-the-fact examination of the merits of the underlying dispute.

B. Plaintiffs Are Entitled to a Remand.

This Court, in its recent decision in *Friends of the Earth, Inc., supra*, states that it "is for the District Court, not this Court, to address in the first instance any request for reimbursement of costs, including fees."528 U.S. __, 120 S.Ct. at 712. In this case, the Plaintiffs presented their request for fees to the District Court based upon the facts set forth above and it was denied solely because of the Fourth Circuit's decision in *S-1 and S-2*. This Court should now reverse that decision and allow the Plaintiffs to proceed with their fee request in the district court.

This Court granted certiorari solely on the general question whether the catalyst theory is an appropriate basis for recovering attorney's fees under federal fee-shifting statutes. *See* Petition at i. In our judgment, if the Court upholds the catalyst theory, it should not go beyond that question and answer a subsidiary question that is *not* presented: whether, under the particular facts of this case, Plaintiffs' lawsuit was in fact a catalyst for the relief that they obtained. To be sure, the District Court said that Plaintiffs "might prevail on this theory," Pet. App. A17, and the chronology of events certainly points in

that direction.[16] But the causation inquiry is highly idiosyncratic and fact-bound, and thus one that should be addressed by the District Court in the first instance. Similarly, it would be unwise for the Court to engage in such an inquiry, because the result would not provide lower courts with much, if any, guidance for other cases that necessarily turn on their own facts and peculiarities.

The fact that Plaintiffs' lawsuit ultimately led to a repeal of the self-preservation rules, through regulatory and legislative action, does not distinguish this case analytically from other catalyst theory cases. Contrary to the arguments of the State Fire Marshal before this Court, several courts have awarded attorney's fees under the catalyst theory even where the relief occurred through legislative action. *E.g., Paris v. United States Dept. of Housing & Urban Development*, 988 F.2d 236 (1st Cir. 1993); *Institutionalized Juveniles v. Secretary of Public*

---

[16] The Plaintiffs filed their Complaint in this matter on October 28, 1996, and the Defendants contested the Plaintiffs allegations vigorously. On March 11, 1997, Plaintiffs took the depositions of State Fire Marshal Smittle and Deputy Fire Marshal Darl Cross and each of them asserted that they could not eliminate or modify the self-preservation rule as it was absolutely necessary to protect the elderly in residential care homes, as well the staff and firefighters who serve such residents, from injury by fire. (Stipulation Exhibit 4, Cross Depo. at p. 14, 20-22); (Stipulation Exhibit 5, Smittle Depo. at p. 22-24). In addition, their counsel advised that the State Fire Marshal was definitely unwilling to settle this matter and that it would have to be resolved by the Courts. (¶ 10, Affidavit of Counsel, JA 131). Significantly, a mere six weeks after the depositions and that rebuff of settlement efforts, the State Fire Marshal's Office took steps to eliminate the self-preservation rules.

Welfare, 758 F.2d 897, 917 (3d Cir. 1985); *Owner-Operator Independent Drivers Association, Inc. v. Bissell*, 210 F.3d 595 (6th Cir. 2000). In some cases, it might be difficult to trace the enactment of a legislative or regulatory body to a particular lawsuit. In cases where there is solid evidence that the relevant actors were prompted by the threat of litigation, the inquiry can be quite simple. Thus, although, in general, discerning causation may be more difficult where the action is taken by a multi-member legislative body, rather than regulatory agency, the inquiry remains the same.

In this case, moreover, focusing solely on the actions of the State Fire Marshal and the West Virginia Legislature may well be inappropriate in determining whether Plaintiffs' lawsuit was in fact a catalyst for the relief that they obtained. On October 18, 1996, OHFLAC issued three Cease and Desist Orders that would have left elderly residents such as 102-year-old Plaintiff Dorsey Pierce without a home.(JA 46-55). The Plaintiffs sought a temporary restraining order to enjoin enforcement of the Cease and Desist Orders. The restraining order was effectively granted, when the District Court entered an Agreed Order, under which the Defendants pledged not to enforce the Cease and Desist Orders pending resolution of the validity of the self-preservation rules.

That Agreed Order remained in effect for the entire suit, until the District Court dismissed the case as moot after the West Virginia Legislature approved the Fire Marshal's request to repeal the self-preservation rules and enacted a provision

deleting OHFLAC's self-preservation rules. That being the case, on remand, the Plaintiffs can argue that the focus of the catalyst inquiry should be on the fact that the lawsuit prevented the Defendants from enforcing their Cease and Desist Orders rather than, or in addition to, the enactments of the West Virginia Legislature.

These facts underscore the need for further proceedings below on the question of whether Plaintiffs' lawsuit was a catalyst for the relief obtained. More fundamentally, these facts underscore the error of the Fourth Circuit's no-catalyst rule, which improperly denies attorney's fees to plaintiffs who have fully vindicated their rights under federal law.

CONCLUSION

Based upon the foregoing, this Court should hold that a party prevails when its lawsuit catalyzes the defendant into making changes consistent with the relief requested, even though the lawsuit does not proceed to judgment because it is rendered moot by the defendant's action. This Court should remand this case to the district court to consider the Plaintiffs' request for attorney's fees.

Respectfully submitted,

Webster J. Arceneaux, III*
LEWIS, GLASSER, CASEY & ROLLINS, LLP
Suite 700, One Valley Square
Charleston, West Virginia 25301
(304) 345-2000
**Counsel of Record*

Brian A. Glasser
BAILEY & GLASSER, LLP
227 Capitol Street
Charleston, WV 25301
(304) 345-6555

Counsel for Petitioners

November 17, 2000

(16)

Record No. 99-1848

In The Supreme Court of the United States

BUCKHANNON BOARD AND CARE HOME, INC.; THE WEST VIRGINIA RESIDENTIAL BOARD AND CARE HOME ASSOCIATION; and on behalf of all others similarly situated,

Petitioners,

v.

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

JOINT APPENDIX

Webster J. Arceneaux, III
LEWIS, GLASSER, CASEY & ROLLINS, LLP
Suite 700, One Valley Square
Charleston, WV 25301
(304) 345-2000
Counsel of Record for Petitioners

David P. Cleek
Senior Deputy Attorney General
State Capitol Complex
Building 1, Room E-26
Charleston, WV 25305
(304) 558-2021
Counsel of Record for Respondents

Petition for Certiorari Filed: May 15, 2000
Certiorari Granted: September 26, 2000

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

1510P

TABLE OF CONTENTS

Page

Relevant Docket Entries:

United States District Court for the Northern District of West Virginia , Case No. 2:96-CV-106 1

U. S. Court of Appeals for the Fourth Circuit, Case No. 99-1424 16

Complaint for Declaratory and Injunctive Relief and Monetary Damages with parts of Exhibit F filed 10/28/96 22

Defendant's Answer to the Complaint for Declaratory and Injunctive Relief and Monetary Damages filed 11/18/96 56

Defendants West Virginia Department of Health and Human Resources, et al. Motion to Dismiss filed 11/18/96 63

Defendant West Virginia Fire Marshal's Office Renewed Motion for Summary Judgment in Part, Motion to Dismiss in Part, and Objections to Plaintiff's Amended Complaint filed 1/13/97 65

Amended Complaint for Declaratory and Injunctive Relief and Monetary Damages filed 2/7/97 67

Memorandum Opinion and Order
Granting in Part and Denying in Part
Defendants West Virginia Department
of Health and Human Resources, et al.
Motion for Summary Judgment
in Part and Motion to Dismiss in Part
and Denying Defendants West Virginia
Office of the State Fire Marshal, et al. Renewed
Motion for Summary Judgment In Part and
Motion to Dismiss filed 2/18/98 102

Exhibit - Senate Bill 627, attached to Defendants'
Motion to Stay filed 3/4/98 123

Defendant Walter Smittle's Motion to
Dismiss filed 5/15/98 125

Plaintiff's Motion for Attorneys' Fees
filed 6/5/98 126

Webster J. Arceneaux, III's Affidavit in
Support of Motion for Attorneys' Fees
and Expenses filed 6/5/98 128

Defendant Walter Smittle's Response to
Motion for Attorneys Fees filed 6/18/98 132

Defendant Department of Health and
Human Resources Response to Plaintiff's
Motion for Attorneys Fees filed 6/19/98 139

Memorandum Opinion and Order Granting
Motion for Rule 11 Sanctions and Imposing
Sanctions filed 4/22/99 142

Docket as of October 6, 2000 7:01 pm Page 1

U.S. District Court
Northern District of West Virginia (Elkins)
CIVIL DOCKET FOR CASE #: 96-CV-106

Buckhannon Board, et al v. Filed: 10/28/96
WV Dept. of HHS, et al

Assigned to: Judge Frederick P. Stamp, Jr.
Demand: $0,000 Nature of Suit: 950
Lead Docket: None Jurisdiction: Federal Question
Dkt# in other court: None
Cause: 42:405 Fair Housing Act

[Parties and counsel omitted]

10/28/96	1	COMPLAINT filed; FILING FEE $ 120.00, RECEIPT # 29263 (Copy to Judge) (jer) [Entry date 10/29/96]
10/28/96	2	MOTION by plaintiff Buckhannon Board, plaintiff WV Residential Bd., plaintiff Daisy Layman, plaintiff Dorsey Pierce for Temporary Restraining Order. (copy to Judge) (jer) [Entry date 10/29/96]
10/28/96	3	MOTION by plaintiff Buckhannon Board, plaintiff WV Residential Bd., plaintiff Daisy Layman, plaintiff Dorsey Pierce for Preliminary Injunction. (copy to Judge) (jer) [Entry date 10/29/96]

10/28/96 4 NOTICE of Hearing on Motion for Temporary Restraining Order: Tuesday, October 29, 1996 at 1:30 p.m. before the Honorable Judge Robert Maxwell, United States District Courthouse, in Elkins, WV. (copy to Judge) (jer) [Entry date 10/29/96]

10/29/96 5 ORDERED this civil action be, and the same is hereby, transferred to the docket of the Honorable Frederick P. Stamp, Jr. (copies to counsel, all parties listed on the notice of hearing, Judge Stamp) (file sent to Clerk's Office at Wheeling) (signed by Judge Robert E. Maxwell) (jer) [Entry date 10/29/96]

10/29/96 -- CASE reassigned to Judge Frederick P. Stamp Jr. (jer) [Entry date 10/29/96]

10/30/96 6 ORDER, for Temporary Restraining Order (signed by Judge Frederick P. Stamp Jr.) (soa) [Entry date 11/01/96]

11/1/96 -- HEARING ON MOTION FOR TRO held in Wheeling. Proposed order of parties to be filed. (soa) [Entry date 11/01/96]

11/4/96 8 NOTICE of Hearing by Buckhannon Board, WV Residential Bd., Daisy Layman and Dorsey Pierce. (c to Judge) (mji) [Entry date 11/07/96]

11/4/96 9 AGREED ORDER Staying Enforcement Of Cease And Desist Order and Establishing

Briefing Schedule: Discovery deadline on 1/2/97 and Deadline for filing of all motions by 1/15/97. (signed by Judge Frederick P. Stamp Jr.) (c to Judge & counsel) (mji) [Entry date 11/07/96]

11/18/96 12 ANSWER to Complaint For Declaratory and Injunctive Relief And Monetary Damages by State Fire Marshal and Walter Smittle. (Copy to Judge) (mji) [Entry date 11/18/96]

11/18/96 13 MOTION with memorandum in support by WV Dept. of HHS, Gretchen O. Lewis, Off. Health Facility, Nancy Tyler, Sandra L. Daubman and Gaston Caperton to Dismiss. (c to Judge) (mji) [Entry date 11/18/96]

11/20/96 14 MOTION with memorandum in support by St Bd Prof. Nurses and Laura S. Rhodes for Summary Judgment In Part, and to Dismiss In Part. (c to Judge) (mji) [Entry date 11/21/96]

11/22/96 15 MOTION Joining In Other defendants' Motion to Dismiss by State Fire Marshal and Waler Smittle. (copy to Judge) (mji) [Entry date 11/25/96]

12/16/96 20 MEMORANDUM by St Bd Prof. Nurses and Laura S. Rhodes in support of [14-2] motion to Dismiss In Part, [13-1] motion to Dismiss, Response To Plas' Opposition To The Dfts'

Motions To Dismiss. (c to Judge) (mji) [Entry date 12/19/96]

12/30/96 26 MOTION by plaintiff Dorsey Pierce, plaintiff Daisy Layman, plaintiff WV Residential Bd., plaintiff Buckhannon Board to Amend [1-1] complaint. (copy to Judge) [complaint attached] (mji) [Entry date 01/06/97]

Docket as of October 6, 2000 7:01 pm Page 13

1/13/97 27 RESPONSE by WV Dept. of HHS and Gaston Caperton to [26-1] motion to Amend [1-1] complaint. (c to Judge) (mji) [Entry date 01/16/97]

1/13/97 28 OBJECTIONS by St Bd Prof. Nurses and Laura S. Rhodes to [26-1] motion to Amend [1-1] complaint. (c to Judge) (mji) [Entry date 01/16/97]

1/13/97 29 MOTION by defendant State Fire Marshal for Renewed Motion Of Summary Judgment In Part, and to Dismiss In Part. (copy to Judge) (mji) [Entry date 01/16/97] [Edit date 02/20/98]

1/13/97 29 OBJECTIONS by State Fire Marshal to [26-1] pla's motion to Amend [1-1] complaint. (c to Judge) (mji) [Entry date 01/16/97]

1/23/97 30 MEMORANDUM by Dorsey Pierce, Daisy Layman, WV Residential Bd. and Buckhannon Board in opposition to The Dfts' Objections To

The [28-1] motion To Amend The Complaint. (c to Judge) (mji) [Entry date 01/23/97]

2/7/97 31 MEMORANDUM OPINION AND ORDER granting [26-1] motion to Amend [1-1] complaint. (signed by Judge Frederick P. Stamp Jr.) (c to Judge & counsel) (mji) [Entry date 02/07/97]

Docket as of October 6, 2000 7:01 pm Page 14

2/7/97 32 AMENDED COMPLAINT by Dorsey Pierce, Daisy Layman, WV Residential Bd. and Buckhannon Board, (Answer due 2/27/97) amending [1-1] complaint against WV State Fire Comm., John Beaty II, Joseph J. Bostar III, Randy Breeden, James W. Fife, Francis A. Guffey II, Daniel Hess, Gregory Alan Lay, David L. Tolliver, Stephen C. McBee, Bill L. Spencer, Stallard Jr., J.D. Waggoner and Kenneth Morgan .(Copy to Judge) (mji) [Entry date 02/10/97]

Docket as of October 6, 2000 7:01 pm Page 15

3/10/97 39 RESPONSE by Walter Smittle, State Fire Marshal, Sandra L. Daubman, Nancy Tyler, Off. Health Facility, Gretchen O. Lewis, WV Dept. of HHS, WV State Fire Comm., John Beaty II, Joseph J. Bostar III, Randy Breeden, James W. Fife, Francis A. Guffey II, Daniel Hess, Gregory Alan Lay, David L. Tolliver, Stephen C. McBee, Bill L. Spencer, Victor Jr., J.D. Waggoner and Kenneth Morgan to

Amended Complaint For Declaratory And Injunctive Relief And Monetary Damages. (Copy to Judge) (mji) [Entry date 03/11/97]

Docket as of October 6, 2000 7:01 pm Page16

12/12/97 44 STIPULATION OF DISMISSAL. (Copy to Judge) (mji) [Entry date 12/17/97]

12/31/97 45 MOTION with memorandum in support by State of WV, Gaston Caperton, Laura S. Rhodes, St Bd Prof. Nurses, Walter Smittle, State Fire Marshal, Sandra L. Daubman, Nancy Tyler, Off. Health Facility, Gretchen O. Lewis, WV Dept. of HHS, WV State Fire Comm., John Beaty II, Joseph J. Bostar III, Randy Breeden, James W. Fife, Francis A. Guffey II, Daniel Hess, Gregory Alan Lay, David L. Tolliver, Stephen C. McBee, Bill L. Spencer, Victor Stallard Jr., J.D. Waggoner and Kenneth Morgan for Summary Judgment. (c to Judge) (mji) [Entry date 01/05/98] [Edit date 01/05/98]

Docket as of October 6, 2000 7:01 pm Page 17

1/2/98 46 STIPULATION: To The Following Documents To Be Used by this Court In Considering The Parties Cross-Motions for Summary Judgement... (Copy to Judge) (mji) [Entry date 01/05/98] [Edit date 01/05/98]

1/5/98 47 MOTION with memorandum in support by Dorsey Pierce, Daisy Layman, WV Residential Bd. and Buckhannon Board for Summary

Judgment w/four bound note books exhibits 1-13 containing the Stipulated documents. (c to Judge w/note books to be returned to the Clerk's office after trial) (mji) [Entry date 01/05/98]

1/27/98 53 MOTION w/attachments by Buckhannon Board, Dorsey Pierce, Daisy Layman, WV Residential Bd. for Summary Judgment - Revised referring to [47-1] motion for Summary Judgment. (copy to Judge) (rjs) [Entry date 01/27/98]

1/27/98 54 Revised MEMORANDUM by Buckhannon Board, Daisy Layman, Dorsey Pierce, WV Residential Bd. in support of [53-1] amended motion for Summary Judgment - Revised. (copy to Judge) (rjs) [Entry date 01/27/98]

Docket as of October 6, 2000 7:01 pm Page 18

2/12/98 56 RESPONSE by State of WV, Gaston Caperton, Laura S. Rhodes, St Bd Prof. Nurses, Walter Smittle, WV State Fire Comm., John Beaty II, Joseph J. Bostar III, Randy Breeden, James W. Fife, Francis A. Guffey II, Daniel Hess, Gregory Alan Lay, David L. Tolliver, Stephen C. McBee, Bill L. Spencer, Victor Stallard Jr., J.D. Waggoner and Kenneth Morgan to [53-1] Plas' motion for Summary Judgment. (c to Judge) (mji) [Entry date 02/13/98]

2/13/98 57 RESPONSE by Plas Dorsey Pierce, Daisy Layman, WV Residential Bd. and Buckhannon Board to Dfts' [47-1] motion for Summary

Judgment, [45-1] motion for Summary Judgment, [29-1] motion for Summary Judgment In Part, [14-1] motion for Summary In Part. (c to Judge) (mji) [Entry date 02/13/98]

2/19/98 58 MEMORANDUM OPINION AND ORDER granting in part and denying in part [13-1] Dfts WV Dept Of Health & Human Resources, Gretchen O. Lewis, Office of Health Facility Licensure And Certification, Nancy Tyler, Sandra L. Daubman And Gaston Caperton's motion to Dismiss, denying [14-1] Dfts WV State Board Of Examiners For Registered professional Nurses And Laura S. Rhodes' motion for Summary Judgment In Part And denying [14-2] motion to Dismiss In Part, And denying [29-2] Dfts WV Office Of The State Fire Marshal And Walter Smitttle's Renewed motion For Summary Judgment In Part And Motion To Dismiss. (signed by Judge Frederick P. Stamp Jr.) (c to Judge & counsel) [WSF-98-71] (mji) [Entry date 02/20/98]

3/3/98 59 MOTION by plaintiff Dorsey Pierce, plaintiff Daisy Layman, plaintiff WV Residential Bd. and plaintiff Buckhannon Board to Dismiss Pla Daisy Layman, by her next friend, Faye Byers. (copy to Judge) (mji) [Entry date 03/03/98]

3/3/98 60 MOTION by plaintiff Dorsey Pierce, plaintiff Daisy Layman, plaintiff WV Residential Bd. and plaintiff Buckhannon Board To Substitute Real Party In Interest. (copy to Judge) (mji) [Entry date 03/03/98]

3/3/98 61 ORDER granting Plas' [59-1] motion to Dismiss Daisy Layman By Her Next Friend Faye Byers And granting Plas' [60-1] Motion To Substitute Real Party In Interest. (signed by Judge Frederick P. Stamp Jr.) (c to Judge & counsel) (mji) [Entry date 03/04/98]

Docket as of October 6, 2000 7:01 pm Page 19

3/4/98 62 STIPULATION: To the following facts to be used by this Court in all matters pending and all matters which may arise before a final order is entered. (Copy to Judge) (mji) [Entry date 03/04/98]

3/4/98 63 MOTION by defendant State of WV, defendant Gaston Caperton, defendant Laura S. Rhodes, defendant St Bd Prof. Nurses, defendant Walter Smittle, defendant WV State Fire Comm., defendant John Beaty II, defendant Joseph J. Bostar III, defendant Randy Breeden, defendant James W. Fife, defendant Francis A. Guffey II, defendant Daniel Hess, defendant Gregory Alan Lay, defendant David L. Tolliver, defendant Stephen C. McBee, defendant Bill L. Spencer, defendant Victor Stallard Jr., defendant J.D. Waggoner and defendant Kenneth Morgan to Stay. (copy to Judge w/Order) (mji) [Entry date 03/05/98] [Edit date 03/05/98]

3/11/98 -- MOTION by defendant State of WV, defendant Gaston Caperton, defendant Walter Smittle, defendant State Fire Marshal, defendant Sandra L. Daubman, defendant Nancy Tyler, defendant

Off. Health Facility, defendant Gretchen O. Lewis, defendant WV Dept. of HHS, defendant WV State Fire Comm., defendant John Beaty II, defendant Joseph J. Bostar III, defendant Randy Breeden, defendant James W. Fife, defendant Francis A. Guffey II, defendant Daniel Hess, defendant Gregory Alan Lay, defendant David L. Tolliver, defendant Stephen C. McBee, defendant Bill L. Spencer, defendant Victor Stallard Jr., defendant J.D. Waggoner, defendant Kenneth Morgan (copy to Judge) (mji) [Entry date 03/11/98]

3/11/98 64 MOTION by defendant State of WV, defendant Gaston Caperton, defendant Walter Smittle, defendant State Fire Marshal, defendant Sandra L. Daubman, defendant Nancy Tyler, defendant Off. Health Facility, defendant Gretchen O. Lewis, defendant WV Dept. of HHS, defendant WV State Fire Comm., defendant John Beaty II, defendant Joseph J. Bostar III, defendant Randy Breeden, defendant James W. Fife, defendant Francis A. Guffey II, defendant Daniel Hess, defendant Gregory Alan Lay, defendant David L. Tolliver, defendant Stephen C. McBee, defendant Bill L. Spencer, defendant Victor Stallard Jr., defendant J.D. Waggoner and defendant Kenneth Morgan for Richard M. Yurko and Amy M. Smith to Withdraw as Attorney, and to Substitute Attorney Charlene A. Vaughan and Chad M. Cardinal. (copy to Judge) (mji) [Entry date 03/11/98]

3/20/98 66 MEMORANDUM by Dorsey Pierce, Daisy Layman, WV Residential Bd. and Buckhannon Board in opposition to [63-1] Dfts' motion to Stay. (c to Judge) (mji) [Entry date 03/20/98]

Docket as of October 6, 2000 7:01 pm Page 20

3/24/98 67 REPLY by WV Dept. of HHS to Pla's Opposition to [63-1] motion to Stay. (c to Judge) (mji) [Entry date 03/24/98]

4/22/98 68 MEMORANDUM OPINION AND ORDER denying [45-1] Dfts' motion for Summary Judgment As Moot, denying [47-1] Plas' motion for Summary Judgment As Moot, denying [53-1] Plas' Revised motion for Summary Judgment As Moot, denying [63-1] Dfts' Motion For Stay And Establishing Briefing Schedule. Motions with respect to the issue of mootness by 5/22/98... (signed by Judge Frederick P. Stamp Jr.) (c to Judge & counsel) [WSF-98-152] (mji) [Entry date 04/24/98] [Edit date 04/24/98]

5/15/98 69 MOTION with memorandum in support by Walter Smittle, State Fire Marshal to Dismiss. (c to Judge) (mji) [Entry date 05/15/98]

5/22/98 70 MOTION with memorandum in support by WV Dept. of HHS And Cecil Underwood to Dismiss and Renewed Motion For Summary Judgment. (c to Judge) (mji) [Entry date 05/26/98]

6/5/98 72 RENEWED MOTION by plaintiff Dorsey Pierce, plaintiff Daisy Layman, plaintiff WV

Residential Bd. and plaintiff Buckhannon Board for Summary Judgment. (copy to Judge) (mji) [Entry date 06/05/98]

6/5/98 73 RESPONSE by Dorsey Pierce, Daisy Layman, WV Residential Bd. and Buckhannon Board to [70-1] motion to Dismiss and [69-1] motion to Dismiss. (c to Judge) (mji) [Entry date 06/05/98]

6/5/98 73 MEMORANDUM by Dorsey Pierce, Daisy Layman, WV Residential Bd. and Buckhannon Board in support of Their Renewed [72-1] motion for Summary Judgment. (c to Judge) (mji) [Entry date 06/05/98]

6/5/98 74 MOTION with memorandum in support by Dorsey Pierce, Daisy Layman, WV Residential Bd. and Buckhannon Board for Attorneys' Fees. (c to Judge) (mji) [Entry date 06/05/98]

6/5/98 75 AFFIDAVIT by Dorsey Pierce, Daisy Layman, WV Residential Bd. and Buckhannon Board In Support Of [74-1] motion for Attorneys Fees And Expenses. (c to Judge) (mji) [Entry date 06/05/98]

Docket as of October 6, 2000 7:01 pm Page 21

6/11/98 76 STIPULATION Of Dismissal: That Counts IV,V, and VI of the Amended Complaint relating to Dfts WV Dept of Health and Human Resources, Gretchen O. Lewis, And Office of Health Facility Licensure and Certification,

Nancy Tyler, Sandra L. Daubman, are dismissed without prejudice from this action. Also Counts IV,V, and VI are stricken from Plas' Amended Complaint. (Copy to Judge) (mji) [Entry date 06/12/98]

6/15/98 77 REPLY by WV Dept. of HHS to Pla's response to Dft's [70-1] motion to Dismiss. (c to Judge) (mji) [Entry date 06/15/98]

6/15/98 78 REPLY by Walter Smittle and State Fire Marshal to response to [69-1] Dfts' motion to Dismiss. (c to Judge) (mji) [Entry date 06/16/98]

6/18/98 79 RESPONSE by Walter Smittle and State Fire Marshal to [74-1] motion for Attorney Fees. (c to Judge) (mji) [Entry date 06/18/98]

6/19/98 80 RESPONSE by WV Dept. of HHS to Pla's [74-1] motion for Attorneys Fees. (c to Judge) (mji) [Entry date 06/19/98]

6/30/98 81 MEMORANDUM by Dorsey Pierce, Daisy Layman, WV Residential Bd. and Buckhannon Board Regarding [74-1] motion for Attorneys' Fees. (c to Judge) (mji) [Entry date 06/30/98]

1/29/99 83 MEMORANDUM OPINON and ORDER: Denying [74-1] motion for Attorneys' Fees; Denying [72-1] motion for Summary Judgment; Granting [70-1] motion to Dismiss; Denying [70-2] renewed motion for Summary Judgment; Granting [69-1] motion to Dismiss; and

Directing defs., Smittle, WV Office of State Fire Marshal, and WV State Fire Commission to submit memorandum by 2/16/99 to Show Cause shy they have not violated Rule 11; pltffs. to respond by 2/23/99. (signed by Judge Frederick P. Stamp Jr.) (copies to counsel, Judge) [WSF-99-23] (soa) [Entry date 01/29/99] [Edit date 02/01/99]

2/17/99 85 Memorandum In RESPONSE filed by Walter Smittle, State Fire Marshal and WV State Fire Comm. to [83-1] order to Show Cause. (Copy to Judge) (mji) [Entry date 02/19/99]

2/23/99 87 MOTION with memorandum in support by Dorsey Pierce, Daisy Layman, WV Residential Bd. and Buckhannon Board for Rule 11 Sanctions. (c to Judge) (mji) [Entry date 02/23/99]

2/23/99 87 RESPONSE filed by Dorsey Pierce, Daisy Layman, WV Residential Bd. and Buckhannon Board to [85-1] response To Dfts' Show Cause Memorandum. (Copy to Judge) (mji) [Entry date 02/23/99]

3/29/99 88 NOTICE OF APPEAL by Dorsey Pierce, Daisy Layman, WV Residential Bd. and Buckhannon Board. FILING FEE $ 105.00 RECEIPT # 31263. (c to Judge, 4th Cir., counsel) (mji) [Entry date 04/07/99]

3/29/99 -- Notice of appeal, certified copy of docket sheet, copies of orders and transmittal sheet sent to USCA: [88-1] appeal by Buckhannon Board, WV Residential Bd., Daisy Layman and Dorsey Pierce. (c to Judge, counsel) (mji) [Entry date 04/07/99]

4/8/99 89 Certification of Completion and Transmittal Sheet sent to USCA [88-1] appeal by Buckhannon Board, WV Residential Daisy Layman and Dorsey Pierce. (c to counsel) (mji) [Entry date 04/08/99]

4/22/99 90 Memorandum Opinion And ORDER granting [87-1] motion for Rule 11 Sanctions And Imposing Sanctions. Dfts are to pay plas attorney's fees and costs in the amount of $3,252.00 within ten days of this order. (signed by Judge Frederick P. Stamp Jr.) (c to Judge, counsel) (mji) [Entry date 04/22/99]

4/26/99 91 ORDER Of Dismissal: On 4/22/99 this Court entered a memorandum opinion and order imposing sanctions on dfts pursuant to Rule 11. As a result, this Court finds it appropriate to dismiss this civil action. (signed by Judge Frederick P. Stamp Jr.) (c to Judge, counsel, 4th Cir.) [WSF-99-140] (mji) [Entry date 04/26/99]

4/26/99 -- Case closed; S.F.: WSF-99-140. (mji) [Entry date 04/28/99]

1/24/00 92 Per Curiam from USCA: [88-1] appeal by Buckhannon Board, WV Residential Bd., Daisy

Layman, Dorsey Pierce, USCA decision: AFFIRMED, unpublished. (c to Judge) (mji) [Entry date 01/25/00]

1/25/00 -- Returned file to Elkins by Wally Edgell 1/26/00. (mji) [Entry date 01/25/00] [Edit date 01/25/00]

Docket as of October 6, 2000 7:01 pm Page 23

2/18/00 93 ORDER (4th Circuit Court of Appeals 2/15/00): Denying Petition for Rehearing and Rehearing En Banc. (soa) [Entry date 02/24/00]

2/25/00 94 JUDGMENT ORDER USCA (certified copy) Court affirms the judgment of the District Court Re: [88-1] appeal by Buckhannon Board, WV Residential Bd., Daisy Layman and Dorsey Pierce. (c to Judge) (mji) [Entry date 02/28/00]

10/4/00 -- NOTIFICATION from 4th Circuit of the Granting of the Writ of Certiorari by U. S. Supreme Court on 9/26/00. (soa) [Entry date 10/06/00]

General Docket
Fourth Circuit Court of Appeals

99-1424 99-1424

Court of Appeals Docket #: 99-1424 Filed: 4/1/99

Nsuit: 3950 Constitutional - State Statute
Buckhannon Board, et al v. WV Dept Health Hum, et al

Appeal from: Northern District of West Virginia (Elkins)

Lower court information:

District: 0424-2 : CA-96-106-2
Presiding Judge: Frederick P. Stamp, Jr., Chief District Judge
Date Filed : 10/28/96
Date order/judgment: 1/29/99
Date NOA filed: 3/29/99

Fee status: Paid

Prior cases:
None
Current cases:
None

Docket as of October 6, 2000 2:09 pm Page 1

[Case Style, Parties and Counsel Omitted]

Docket as of October 6, 2000 2:09 pm Page 6

3/30/99 Docketing statement filed by Appellant Buckhannon Board, Appellant WV Residential Bd, Appellant Dorsey Pierce [2962599-1]. T/S needed? n. T/S already on file?: n. [99-1424] [ldj]

4/1/99 Civil case docketed. (ldj)

4/5/99 Docketing notice issued. [99-1424] Appellant(s) brief/joint appendix due

5/17/99 for Almost Home, Inc. for Dorsey Pierce, for WV Residential Bd, for Buckhannon Board. (ldj)

4/20/99 Designation of appendix filed by Appellant Buckhannon Board, Appellant WV Residential Bd, Appellant Dorsey Pierce, Appellant Almost Home Inc [2972248-1] [99-1424] (ldj)

4/26/99 Notice of district action filed. By order dated 4/22/99, the district court granted the motion for Rule 11 sanctions and imposed sanctions. [99-1424] (ldj)

4/29/99 Notice of district action filed. By order dated 4/26/99, the district court dismisses this civil action from the active docket. [99-1424] (ldj)

5/28/99 Brief joint appendix filed by Appellant Buckhannon Board, Appellant WV Residential Bd, Appellant Dorsey Pierce, Appellant Almost Home, Inc. Type of Service: HD Copies of brief: 8 # brf pages: 42 Copies of apx: 6 # apx pages: 345 Sufficient? Y 2-sided copying: y [99-1424] Appellee brief due 6/28/99 for Cecil H. Underwood, for John Wilkenson, for Joan E. Ohl, for Kenneth Morgan, for J.D. Waggoner, for Victor Stallard, for Bill L. Spencer, for Stephen C. McBee, for David L. Tolliver, for Gregory Alan Lay, for Daniel Hess, for Francis A. Guffey, for James W. Fife, for Randy Breeden, for Joseph J. Bostar, for John Beaty,

for WV State Fire Comm, for State of WV, for Walter Smittle, for WV Ofc State Fire, for Sandra L. Daubman, for Office of Health, for WV Dept Health Hum (ldj)

7/7/99 Brief filed by Appellee Sandra L. Daubman, Appellee WV Ofc State Fire, Appellee Walter Smittle, Appellee State of WV, Appellee WV State Fire Comm. Appellee John Beaty, Appellee Joseph J. Bostar, Appellee Randy Breeden, Appellee James W. Fife, Appellee Francis A. Guffey, Appellee Daniel Hess, Appellee Gregory Alan Lay, Appellee David L. Tolliver, Appellee Stephen C. McBee, Appellee Bill L. Spencer, Appellee Victor Stallard, Appellee J.D. Waggoner, Appellee Kenneth Morgan, Appellee Joan E. Ohl, Appellee John Wilkenson, Appellee Cecil H. Underwood, Type of Service: PM Copies: 8 # brf pages: 18. Sufficient [Y/N}: Y. [99-1424] (ldj)

7/8/99 Brief filed by Appellee WV Dept Health Hum, Appellee Office of Health. Type of Service: PM Copies: 8 # brf pages: 25. Sufficient [Y/N]: Y [99-1424] (ldj)

7/26/99 Reply brief filed by Appellant Buckhannon Board, Appellant WV Residential Bd, Appellant Dorsey Pierce. Type of Service: PM Copies of brief: 8 #brf pages: 17. Sufficient [Y/N]: Y. .. [99-1424] (ldj)

8/3/99 Motion filed by Appellee WV Dept Health Hum, Appellee Office of Health, Appellee Sandra L. Daubman to submit case on briefs without oral argument [3032095-1]. [99-1424] (ldj)

8/3/99 Motion filed by Appellee WV Ofc State Fire, Appellee Walter Smittle, Appellee State of WV, Appellee WV State Fire Comm to submit case on briefs without oral argument [3032104-1]. [99-1424] (ldj)

8/3/99 Response/answer filed [3032108-1] by Appellant Buckhannon Board, Appellant WV Residential Bd, Appellant Dorsey Pierce to motion to submit case on briefs [3032095-1], motion to submit case on briefs [3032104-1] [99-1424] Appellants simultaneously filed their motion with the motions to submit case on briefs. SAR said that I could docket as a response to the motion. (ldj)

10/13/99 Case calendared for oral argument. [99-1424] (jc)

12/2/99 Oral argument heard. Courtroom Deputy: JLE. [99-1424] (jle)

1/20/00 Unpublished per curiam opinion filed. [99-1424] (bhr)

1/20/00 Judgment order filed. Decision: affirmed. EOD Date: 1/20/00. [99-1424] (brh)

2/2/00 Petition filed by Appellant Buckhannon Board, Appellant WV Residential Bd, Appellant Dorsey Pierce for rehearing. Number copies filed: 20 [3127774-1]., for rehearing en banc. Number of copies filed: 20 [3127774-2] [99-1424] (ldj)

2/15/00 COURT ORDER filed denying motion for rehearing [3127774-1] EOD Date: 2/15/00., denying motion for rehearing en banc [3127774-2] EOD Date: 2/15/00. Copies to all counsel. [99-1424] (ldj)

2/23/00 Mandate issued. [99-1424] (ldj)

5/22/00 Supreme Court notice that petition for certiorari was filed on 05/15/00. Spct No.: 99-1848 Spct Pty 1: Buckhannon Board & Care Home Spct Pty 2: WV Dept Health & Human Resources. [99-1424] (dhb)

10/2/00 Supreme Court order received granting petition certiorari [3189534-1] on 09/26/00. [99-1424] (dhb)

[Case Style Omitted]

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND MONETARY DAMAGES

INTRODUCTION

1. This complaint seeks declaratory and injunctive relief, and monetary damages, under the Fair Housing Act, 42 U.S.C. §§3601 et seq. ("FHA"), and the Americans with Disabilities Act of 1990, 42 U.S.C. §12101 et seq. ("ADA"). The subject of the complaint is West Virginia State Code §§ 16-5C-1 et al., 29-3-1, et al., 30-7-1, et al. and regulations promulgated thereunder. These provisions narrowly define the class of persons who may live in Residential Board and Care Homes in West Virginia, and otherwise sharply limit the circumstances under which individuals with mental and physical disabilities may choose to live together. These provisions, both on their face and as applied to the Plaintiffs in this case, are discriminatory housing practices and violate the Fair Housing Act and the Americans with Disabilities Act. Plaintiffs seek to enjoin Defendants from applying discriminatory standards to homes with disabled adults which are not applied to other homes.

JURISDICTION AND VENUE

2. This Court has jurisdiction over this action pursuant to 28 U.S.C. §1331 (federal question) and 42 U.S.C. §3613(a)(1)(A) and 42 U.S.C. § 12133. Venue is proper in the Northern District of West Virginia pursuant to 28 U.S.C. §1391(b) in that, inter alia, the events and omissions giving rise to Plaintiffs' claims occurred in Upshur County, West Virginia.

PARTIES

3. Plaintiff, Buckhannon Board and Care Home, Inc., ("BBC") is a corporation organized and existing under the laws of the State of West Virginia with its principal place of business at Buckhannon, West Virginia. BBC is an "aggrieved person" within the definition of 42 U.S.C. §3602 (i) and as used in 42 U.S.C. §3613(a)(1)(A). BBC is associated with, and provides housing to, persons with handicaps as defined in 42 U.S.C. §3602(h). BBC provides housing to "qualified individuals with a disability" as defined in 42 U.S.C. §12131(2). BBC operates three (3) residential care homes which provide housing and services to elderly people who require some assistance with activities of daily living, but who choose to live in a non-institutional setting. These homes are operated by Shirley Dean and are located at the following addresses: 4 Cleveland Avenue, 79 South Florida Street, and 12 Marion Street, Buckhannon West Virginia, 26201.

4. Plaintiff, Daisy Layman is a resident of BBC. She is over 90 years old, is mentally disabled, and is a person with a "handicap" within the meaning of 42 U.S.C. §3602 (h) and a "qualified individual with a disability" within the meaning of 42 U.S.C. §12131 (2). Because Ms. Layman is unable to understand fully the nature of these legal proceedings, she sues through Faye Byers, as her next friend.

5. Plaintiff, Dorsey Pierce, is also a resident of BBC. She is over 90 years old, is mentally disabled, and is a person with a "handicap" within the meaning of 42 U.S.C. §3602(h) and a "qualified individual with a disability" within the meaning of 42 U.S.C. §12131(2). Because Ms. Pierce is unable to understand fully the nature of these legal proceedings, she sues through Lockie J. Marple, as her next friend.

6. Plaintiff, The West Virginia Residential Board and Care Home Association ("WVRBCA"), represents and is comprised of similarly situated residential board and care homes, more fully identified on Exhibit A, attached hereto. These homes provide accommodation and personal assistance to four (4) to ten (10) persons who are not related to the home owner and are dependent upon the services of others by reason of physical or mental impairment. W Va. Code § 16-5C-2(f).

7. Defendant, West Virginia Department of Health and Human Resources ("HHR") is a Department within the Executive Department of the State of West Virginia. HHR is responsible for overseeing, administering, implementing, and enforcing all laws and developing appropriate procedures regarding health policy. Gretchen O. Lewis is the Secretary of HHR and is sued in her official capacity.

8. The Office of Health Facility Licensure and Certification ("OHFLAC") is an office within HHR that adopts, implements, and enforces regulations for the licensure of Residential Board and Care Homes. Nancy Tyler and Sandra Daubman are, respectively, the Director and Program Manager within OHFLAC. Defendants Tyler and Daubman are sued in their official capacities.

9. Defendant, West Virginia Office of the State Fire Marshal ("Fire Marshal"), is the administrative body vested with the authority under the West Virginia Code to implement and monitor fire safety regulations. Walter Smittle is the State Fire Marshal and as such, is authorized to enforce the State Fire Code and underlying Regulations. Defendant Smittle is sued in his official capacity.

10. Defendant, West Virginia State Board of Examiners for Registered Professional Nurses ("Nursing Board"), is the administrative body vested with the authority to govern the practice of registered professional nursing within the state of West Virginia. Laura S. Rhodes is the Executive Director of the Board of Examiners and as such is authorized to enforce the State Nursing Code and Regulations. Defendant Rhodes is sued in her official capacity.

11. The Defendant Gaston Caperton is the Governor of the State of West Virginia and as such is responsible for employment decisions in the HHR and for the overall enforcement policy. He is named in his official capacity as Governor of West Virginia.

12. The Defendant State of West Virginia was established by Presidential Proclamation in 1863 as an independent State.

STATUTORY AND REGULATORY BACKGROUND

Office of Health Facility Licensure and Certification

13. The State has enacted a statutory and regulatory scheme, codified at §§ 16-5C-1, et al. of the West Virginia Code and accompanying State Regulations, 64 CSR §§ 65-1 et al., (hereinafter collectively referred to as "Chapter 16"), purporting to govern the establishment and operation of group homes for persons with disabilities, known as "residential board and care facilities" ("RBCF"). The applicability of the proscriptions of Chapter 16, and therefore, the right of individuals with mental and physical handicaps to live where they choose in West Virginia, is intentionally and expressly limited because of the nature of those individuals' mental and

physical handicaps. As such, the enforcement of Chapter 16 is discrimination in violation of the Fair Housing Act and the Americans with Disabilities Act.

14. The OHFLAC is responsible for enforcing the requirements of Chapter 16. Pursuant to Chapter 16, the OHFLAC may conduct periodic inspections of facilities licensed under Chapter 16, and may issue Deficiency Correction Orders to RBCFs that are not in compliance with the State's regulations.

15. BBC is licensed by the State under Chapter 16. Up to ten persons, including Plaintiffs Daisy Layman and Dorsey Pierce, live at each of the three homes. Between one and four employees staff each BBC site at all times, providing the residents with assistance in their activities of daily living.

16. In addition to being licensed under Chapter 16, BBC is in full compliance with the State Fire Safety Code governing RBCFs.

17. Under Chapter 16, only persons meeting the statutory definition of "self-preservation" are permitted to live in Residential Board and Care Facilities. Pursuant to West Virginia CSR § 64-65-3.32, "self-preservation" is defined as "the capability of , at least, removing one's physical self from situations involving imminent danger, such as fire."

18. OHFLAC is enforcing the "self-preservation" rule set forth above against BBC because it is providing housing to Plaintiffs Daisy Layman and Dorsey Pierce.

Fire Code

19. The State has enacted a Statutory and regulatory scheme, codified at §§ 29-3-1 et al. of the West Virginia Code and accompanying State Regulations, 87 West Virginia CSR §§ 1-1 et al., (hereinafter collectively referred to as "Chapter 29"), which in general govern fire prevention and control within the State.

20. West Virginia CSR § 87-1-14.7 in part mandates all residents of RBCFs shall be capable of self-preservation. "Self-preservation" is defined as the capability of "removing his or her physical self from situations involving imminent danger, such as fire."

21. Among other things, Chapter 29 also mandates that RBCFs must provide:

a. Electrically supervised fire alarm.
b. Automatic sprinkler system.
c. Hardwired smoke detectors.

22. None of these provisions are required for other residential homes.

Nursing Act

23. The State has enacted as statutory and regulatory scheme codified at §§ 30-7-1 et al.. of the West Virginia Code and accompanying State regulations, § 19 CSR 1.1 et al.. (hereinafter collectively referred to as "Chapter 30" or "Nursing Act") which governs the practice of professional nursing in the State.

24. West Virginia Code § 30-7-1 defines the "practice of Registered Nursing" as:

the performance for compensation of any service requiring substantial specialized judgment and skill based on knowledge and application of principles of nursing derived from the biological, physical and social sciences, such as responsible supervision of a patient requiring skill in observation of symptoms and reactions and the accurate recording of the facts, or the supervision and teaching of other persons with respect so such principles of nursing, or in the administration of medications and treatments as prescribed by a licensed physician or a licensed dentist, or the application of such nursing procedures as involve understanding of cause and effect in order to safeguard life and health of a patient and others. (emphasis added)

25. West Virginia CSR § 19-10-3 provides inter alia:

> 3.10 The registered professional nurse shall delegate to another only those nursing measures which that person is prepared or qualified to perform.
>
> 3.11 The registered professional nurse shall supervise others to whom nursing interventions are delegated.
>
> 3.12 The registered professional nurse shall retain professional accountability for nursing care when delegating nursing interventions.

26. The Nursing Board has interpreted the above provisions to prohibit the administering of any medications, by anyone other than a registered professional nurse.

Similarly Situated Residents and Homes

27. Chapter 16 applies to RBCFs with 4 to 10 residents. W.Va. Code §16-5C-2(f). A similar definition is provided in Chapter 29. W Va. CSR § 87-1-14.7. By definition, RBCFs with 1 to 3 residents are not subject to either Chapter 16 or Chapter 29. The effect has been a drastic increase in the number of unregulated homes with three residents. The number of these homes has increased to approximately 250. Exhibit B.

28. Fraternal organizations are permitted to develop and operate homes and asylums for the care and support of orphans and widows of deceased members, and of disabled and aged members in indigent circumstances. The fraternal operated homes are not subject to Chapters 16 and 29. These homes are self-governed:

> Any such grand lodge desiring to establish a home or asylum shall adopt and prescribe such rules an regulations for the government and control thereof as may be deemed wise by such grand body; and it shall appoint a board of directors, trustees, regents or commissioners, composed of a specified number of persons from its own membership, not fewer than seven nor more than eleven, to serve for definite periods; and any such grand lodge may select for each of such boards two members from the associate branches of the orders, known as

> Pythian Sisters, Rebekahs, Eastern Star, or other like organizations, as the case may be. Such board shall have the management and control of the home or asylum for which it is appointed, under the prescribed rules and regulations adopted by said body for the government thereof. Such board of directors, trustees, regents or commissioners shall organize by the election of a president, secretary and treasurer, and , if necessary or expedient, an executive committee, all from its own membership. W.Va. Code §35-3-2.

29. Group residential facilities are subject to different less stringent regulations. "Group residential facility" means a facility which:

> (1) Provides residential services and supervision for individuals who are developmentally disabled or behaviorally disabled; (2) is occupied as a residence by not more than eight individuals who are developmentally disabled and not more than three supervisors, or is occupied as a residence by not more than twelve individuals who are behaviorally disabled and not more than three supervisors; (3) is licensed by the department of health or the department of human services; and (4) complies with the state fire commission for residential facilities. W.Va. Code §27-17-1.

Group residential facilities are not subject to Chapters 16 and 29 requirements.

30. Residents who do not qualify under the "self preservation" definition may reside in an RBCF if they are receiving hospice care.

STATE ACTION AND FACTUAL BACKGROUND

Self-Preservation

31. Neither Daisy Layman nor Dorsey Pierce is capable of "self-preservation" within the meaning of Chapters 16 or 29, because neither is independently capable of exiting from a building, following instruction and responding to an alarm. Both are, however, capable of safely exiting with the staff assistance available there.

32. On January 30, 1996, an inspector from OHFLAC, inspected BBC, and issued a Statement of Deficiency on the grounds that, because of their handicaps, ie their mobility to exit the premises without assistance, they did not meet the definition of "self-preservation."

33. BBC's Plan of Correction was rejected because the residents in question would not be evicted from BBC and transferred to a nursing home. A true and accurate copy of the February 1996 Deficiency Statement and related documents is attached hereto as Exhibit C.

34. A second OHFLAC inspection occurred on September 3, 1996. BBC was again cited for failing to comply with the "self-preservation" rule. Exhibit D.

35. The State Fire Marshal also conducted an investigation of BBC. BBC was cited for failure to meet the Chapter 29 definition of "self-preservation".

36. Following the issuance of the Deficiency Statements, BBC attempted to persuade the Defendants to make reasonable accommodations for Ms. Layman and Ms. Pierce. An exception to the "self-preservation" rule, was permissible in the past, which permitted Ms. Layman and Ms. Pierce to remain at BBC. Specifically, prior to 1996, OHFLAC permitted residents to Waive enforcement of the self-preservation. Attached as Exhibit E are copies of such Waivers. The Defendants refused to accommodate BBC's requests for exception.

37. On October 24, 1996, BBC received an Order from OHFLAC to cease operating as a RBCF and to relocate all residents within thirty (30) days. Exhibit F.

38. The care provided Daisy Layman and Dorsey Pierce at BBC is well suited to their needs. Neither is in need of expensive nursing care; both require only custodial care. BBC provides an important service by preventing premature institutionalization in accordance with the statutory purpose of Chapter 16, stated as follows:

> It is the policy of this State to encourage and promote the development and utilization of resources to ensure the effective care and treatment of persons who are convalescing or whose physical or mental condition requires them to receive a degree of nursing or related health care greater than that necessary for well individuals, but not so acute as to require hospitalization. Such care and treatment requires a living environment for such persons which, to the extent practicable, will approximate a normal home environment. To this end, the guiding principle for administration of the laws of the State is that such persons shall be encouraged and assisted in securing necessary care and treatment in noninstitutional surroundings. In recognition that for many such persons effective care and treatment can only be secured from proprietary, voluntary and governmental nursing homes or personal care homes it is the policy of this State to encourage, promote and require the maintenance of institutions other than hospitals offering nursing or related health care or personal care so as to ensure protection of the rights and dignity of those using the services of such facilities. W. Va. Code § 16-5-C-1 (emphasis added).

39. Moreover, both wish to remain at BBC, and their families want them to remain at BBC. The homes are located near their families and the cost of care is well below that which would be charged by a nursing facility. Further, BBC's homes are in full compliance with the fire code including, among others, smoke detectors and sprinkler systems, as well as around the clock supervision. All of these factors eliminate any fire safety concerns.

CAUSES OF ACTION
COUNT I
(Fair Housing Act as it relates to "self-preservation")

40. The Plaintiffs reallege and incorporate herein the allegations contained in Paragraphs 1 through 39 as though fully set forth herein.

41. The FHA prohibits discrimination on the basis of a physical or mental handicap. Section 3604(f)(1) of the Act makes it unlawful [t]o discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of :

(a) that buyer or renter;

(b) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or

(c) any person associated with that buyer or renter.

42. Similarly, it is unlawful to discriminate against any person in the "terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling because of a handicap of that person." 42 U.S.C. § 3604(f)(2).

43. The FHA, also makes it unlawful to coerce, intimidate, or retaliate against someone for having exercised rights protected by the FHA. 42 U.S.C. § 3617. Furthermore, the FHA requires defendants to make "reasonable accommodations in rules, policies, practices, or services," when such accommodations would enable a person with disabilities to live where he or she chooses. 42 U.S.C. § 3604(f)(3)(B).

44. Plaintiffs, Daisy Layman and Dorsey Pierce, are handicapped persons or persons associated with handicapped persons within the meaning of 42 U.S.C. §3602(h).

45. By virtue of their definition of "self-preservation," Chapters 16 and 29 effectively prohibit any person with the handicap of dementia from living in a group home. The Chapters also prohibit a person with quadriplegic or heimplesia from living in such a home under most circumstances, as well as adults and children with severe or profound mental retardation or acute mental illness. Moreover, it prohibits individuals suffering from normal degenerative aging ailments from residing in group homes.

46. The Chapters 16 and 29 definition of "self-preservation" is not applied to residents of all group homes or other residences, but is selectively applied to residents of group homes for the elderly.

47. The Defendants have refused to make an exception or accommodation in their regulations which would permit Daisy Layman and Dorsey Pierce to continue living at BBC.

48. Defendant's actions as described above are taken with the intent to discriminate and have the effect of discriminating against persons with disabilities and the aged.

49. Defendant's actions as described above have injured and are injuring the Plaintiffs. BBC has expedited considerable resources in seeking a modification of the "self-preservation" rule for Daisy Layman and Dorsey Pierce, and if Daisy Layman and Dorsey Pierce are indeed evicted, BBC will suffer a loss of income. Moreover, the events surrounding the

issuance of the Cease and Desist Order have had a demoralizing effect on BBC staff and residents. Plaintiffs Daisy Layman and Dorsey Pierce are being denied their civil rights to live where they wish. Both Daisy Layman and Dorsey Pierce, as well as their families, have experienced significant emotional distress because of the eviction notice, and the possibility that they will be institutionalized.

50. The Chapters 16 and 29 definition of "self-preservation," both on its face and as applied to these Plaintiffs, violates Plaintiffs' rights under the Fair Housing Act, 42 U.S.C. §§3604(f) and 3617, by:

(a) imposing a term or condition on Plaintiffs that is not imposed on people without disabilities;

(b) denying or otherwise making housing unavailable to Plaintiffs on the basis of their disabilities;

(c) failing to make reasonable accommodations which would enable Plaintiffs to remain in their home;

(d) interfering with the rights of Plaintiffs to live in the housing of their choice.

51. Article VI of the United States Constitution, otherwise known as the Supremacy Clause, provides in pertinent part:

> This Constitution and the Laws of the United States which shall be made in pursuance thereof...shall be the Supreme Law of the Land; and Judges in every State shall be bound thereby, anything in the Constitution of Laws of any State to the contrary notwithstanding.

52. The Chapters 16 and 29 definition of "self preservation" is in violation of the FHA and is preempted by the FHA and Article VI, United State Constitution.

COUNT II
(Americans with Disabilities Act as it relates to "self-preservation")

53. The Plaintiffs reallege and incorporate herein the allegations contained in Paragraphs 1 through 52 as though fully set forth herein.

54. The ADA prohibits discrimination on the basis of a disability by a public entity. Section 12132 provides that:

> No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity. 42 U.S.C. § 12132.

55. Plaintiffs, Daisy Layman and Dorsey Pierce, are qualified individuals with a disability within the meaning of 42 U.S.C. § 12131(2).

56. Article VI of the United States Constitution, otherwise known as the Supremacy clause, provides in pertinent part:

> This Constitution and the Laws of the United States which shall be made in pursuance thereof...shall be the Supreme Law of the Land; and Judges in every State shall be bound

thereby, anything in the Constitution of Laws of any State to the contrary notwithstanding.

57. By virtue of their definition of "self-preservation," Chapters 16 and 29 effectively prohibit any person with the handicap of dementia from living in a group home. The Chapters also prohibit a person with quadriplegic or heimplesia from living in such a home under most circumstances, as well as adults and children with severe or profound mental retardation or acute mental illness. Moreover, it prohibits individuals suffering from normal degenerative aging ailments from residing in group homes.

58. The Chapters 16 and 29 definition of "self-preservation" is not applied to residents of all group homes or other residences, but is selectively applied to residents of group homes for the elderly.

59. The Defendants have refused to make an exception or accommodation in their regulations which would permit Daisy Layman and Dorsey Pierce to continue living at BBC.

60. Defendant's actions as described above are taken with the intent to discriminate and have the effect of discriminating against persons with disabilities and the aged.

61. Defendant's actions as described above have injured and are injuring the Plaintiffs. BBC has expedited considerable resources in seeking a modification of the "self-preservation" rule for Daisy Layman and Dorsey Pierce, and if Daisy Layman and Dorsey Pierce are indeed evicted, BBC will suffer a loss of income. Moreover, the events surrounding the issuance of the Cease and Desist Order have had a demoralizing

effect on BBC staff and residents. Plaintiffs Daisy Layman and Dorsey Pierce are being denied their civil rights to live where they wish. Both Daisy Layman and Dorsey Pierce, as well as their families, have experienced significant emotional distress because of the eviction notice, and the possibility that they will be institutionalized.

62. The Chapters 16 and 29 definition of "self-preservation", both on its face and as applied to Plaintiffs Daisy Layman and Dorsey Pierce, violates Plaintiff's rights under the Americans with Disabilities Act of 1990, 42 U.S.C. §12131 and 12132, and the regulations promulgated thereunder, 28 C.F.R. §35.130, by:

(a) denying the Plaintiffs, by reason of their disabilities, the opportunity to participate in or benefit from the services and programs offered by BBC:

(b) subjecting the Plaintiffs, by reason of their disabilities, to discrimination;

(c) denying the Plaintiffs an opportunity to participate in a program in the most integrated setting appropriate to their needs;

(d) imposing and applying eligibility criteria that screen out the Plaintiffs from fully and equally enjoying the services and program offered by BBC:

(e) denying the Plaintiffs an opportunity to participate in or benefit from the services and program offered by BBC that is equal to that of older people without disabilities.

63. The Chapters 16 and 29 definition of "self preservation" is in violation of the ADA and is preempted by the ADA and Article VI, United States Constitution.

COUNT III

(Fair Housing Act as it relates to the Nursing Act)

64. The Plaintiffs reallege and incorporate herein the allegations contained in Paragraphs 1 through 63 as though fully set forth herein.

65. Plaintiffs, Daisy Layman and Dorsey Pierce, occasionally need assistance with taking medication.

66. By definition of Chapter 30, this can only be done by a registered professional nurse.

67. By virtue of this Chapter 30 effectively prohibits any person with a handicap of disability from residing anywhere other than an institution with skilled nursing care.

68. The Chapter 30 limitation on the administration of medication, both on its face and as applied to Plaintiffs, Daisy Layman and Dorsey Pierce, violates their rights under the Fair Housing Act by:

(a) imposing a term or condition on Plaintiffs that is not imposed on people without disabilities;

(b) denying or otherwise making housing unavailable to Plaintiffs on the basis of their disabilities;

(c) failing to make reasonable accommodations which would enable Plaintiffs to remain in their home;

(d) interfering with the rights of Plaintiffs to live in the housing of their choice.

69. The Chapter 30 limitation on medication administration violates the FHA and is preempted by the FHA and Article VI, United States Constitution.

COUNT IV
(Americans with Disabilities Act as it relates to the Nursing Act)

70. The Plaintiffs reallege and incorporate herein the allegations contained in Paragraphs 1 through 69 as though fully set forth herein.

71. The Chapter 30 limitation on the administration of Medication, both on its face and as applied to Plaintiff's, Daisy Layman and Dorsey Pierce, violates their rights under Americans with Disabilities Act by:

(a) denying the Plaintiffs, by reason of their disabilities, the opportunity to participate in or benefit from the services and programs offered by BBC:

(b) subjecting the Plaintiffs, by reason of their disabilities, to discrimination;

(c) denying the Plaintiffs as opportunity to participate in a program in the most integrated setting appropriate to their needs;

(d) imposing and applying eligibility criteria that screen out the Plaintiffs from fully and equally enjoying the services and program offered by BBC:

(e) denying the Plaintiffs an opportunity to participate in or benefit from the services and program offered by BBC that is equal to that of older people without disabilities.

72. The Chapter 30 limitation on medication administration violates the ADA and is preempted by the ADA and Article VI, United States Constitution.

COUNT V
(Discriminatory Treatment of Similarly Situated Homes)

73. The Plaintiffs reallege and incorporate herein the allegations contained in Paragraphs 1 through 72 as though fully set forth herein.

74. The State of West Virginia has selectively and arbitrarily enacted and applied onerous laws and regulations governing RBCFs. In contrast, homes and asylums of fraternal orders, group residential facilities, RBCFs with less than 4 residents, and hospice patients residing in RBCFs are all exempted from these same or similar laws and regulations.

75. The Defendants' enactment and application of extensive and onerous laws and regulations of Chapters 16 and 29 to RBCFs, while exempting other similarly situated homes and residents, is arbitrary and capricious and violates equal protection and Due Process guarantees of the Constitutions of the United States and West Virginia.

COUNT VII

(Preliminary and Permanent Injunctive Relief)

76. The Plaintiffs reallege and incorporate herein the allegations contained in Paragraphs 1 through 75 as though fully set forth herein.

77. The enforcement of the Cease and Desist Order issued by OHFLAC to BBC on October 24, 1996 and any others issued to similarly situated RBCFs will cause the Plaintiffs irreparable harm for which they have no adequate remedy at law. Such irreparable harm consists of the eviction of thirty residents against their will for which there are no alternatives other than relocation to a nursing home for costs in excess of double those currently incurred by residents of RBCF's. BBC and other RBCFs and their employees will

likewise suffer irreparable harm through loss of income. Such losses are incapable of being determined so as to allow an award of damages as a remedy at law.

78. Plaintiffs fear retaliation by the State of West Virginia, through its Departments, Bureaus, Divisions and officers identified herein, as a result of filing this Complaint. For example, OHFLAC has great latitude and discretion with regard to inspections and enforcement of Chapter 16. The Plaintiff's fear the Defendants may take further action, impose civil penalties or revoke or deny other licenses.

79. Based upon information and belief, some RBCFs declined to join this action because of this fear. Despite the fear of reprisal, the Plaintiffs' have resolved that their homes are in jeopardy and serious risk of closure or insolvency.

80. The harm to the Plaintiff's in the absence of injunctive relief outweighs the potential harm to the Defendants should they prevail on the merits, if injunctive relief is granted by this Court.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff's request that the Court grant the following relief:

(a) To enter a Declaratory Judgment that the "self-preservation" definition under Chapter 16 is in violation of the Fair Housing Act, 42 U.S.C. §§ 3601 et. seq.; and the Americans with Disabilities Act, 42 U.S.C. §§12101 et. seq.;

(b) To enter a Declaratory Judgment that the "self-preservation" definition under Chapter 29 as it applies to RBCF's which comply with all Fire Code provisions is in violation of and preempted by the Fair Housing Act and the

Americans with Disabilities Act. W. Va. Code §29-3-1 et al. and W. Va. CSR § 87-1-14.7;

(c) To enter a Declaratory Judgment that the Fire Code requirements of an electrically supervised fire alarm, automatic sprinkler system, and hardwired smoke detectors as it applies to RBCF's which do not house individuals incapable of self-preservation is in violation of and preempted by the Fair Housing Act and the Americans with Disabilities Act. W. Va. Code §39-3-1 et al. and W. Va. CSR § 87-1-14.7;

(d) Preliminarily and permanently enjoin the Defendants, State of West Virginia, HHR, OHFLAC and Fire Marshal, their agents, and employees, and successors, from enforcing any orders that Daisy Layman and Dorsey Pierce, or other similarly situated residents, be evicted from BBC, and from otherwise enforcing its "self-preservation" rule against BBC and any Residential Board and Care Homes;

(e) To enter a Declaratory Judgment that the "administration of medication" limitation of the Nursing Board is overly broad and in violation of and preempted by the Fair Housing Act, 42 U.S.C., §§ 3601 et seq; and the Americans with Disabilities Act, 42 U.S.C. §§ 12101 et seq;

(f) Preliminarily and permanently enjoin the State of West Virginia, the Governor, HHR, the HHR Secretary, OHFLAC, OHFLAC Director, Nursing Board, the Nursing Board Executive Secretary, including their agents, officers and employees thereof, from taking any action against any participating RBCF until a hearing is held and a decision rendered in this matter.

(g) To enter a Declaratory Judgment that Chapters 16 and 29 insofar as they discriminate against RBCFs by applying different laws and regulations than other similarly situate homes is void as a violation of the United States Constitutional guarantees of Due Process and Equal Protection.

(h) Award appropriate punitive and compensatory damages to the Plaintiffs and against Defendants;

(i) Award the Plaintiffs their costs and reasonable attorneys' fees in this action; and,

(j) Order such other relief as this Court deems just and proper.

BUCKHANNON BOARD AND CARE HOME, INC; THE WEST VIRGINIA RESIDENTIAL BOARD AND CARE HOME ASSOCIATION; DAISY LAYMAN, by her next friend, FAYE BYERS; DORSEY PIERCE, by her next friend LOCKIE J. MARPLE and on behalf of all others similarly situated.

By Counsel

LEWIS, FRIEDBERG, GLASSER, CASEY & ROLLINS

s/ Webster J. Arceneaux, III
Webster J. Arceneaux, III
Chad B. McIntosh
Post Office Box 1746
Charleston, West Virginia 25326
(304) 345-2000

[Verifications omitted]

[The Exhibits to The Complaint Have Not Been Made a Part of The Joint Appendix, With The Exception of The Following Portions of Exhibit F]

State of West Virginia
Department of Health And
Human Resources

Gaston Caperton
Governor

October 18, 1996

Buckhannon Board & Care, Inc. #1
Shirley Dean, Administrator
P.O. Box 474 (Mailing Address)
4 Cleveland Avenue (Facility Address)
Buckhannon, West Virginia 25201

Re: Buckhannon Board & Care, Inc. #1

Dear Ms. Dean:

Enclosed you will find an order issued by the Director of the Office of Health Facility Licensure and Certification (OHFLAC) for your failure to comply with West Virginia Residential Board and Care Home regulations.

If you have any questions regarding this order you can contact me using the address or phone number below.

Sincerely,
s/ Sandra L. Daubman
Sandra L. Daubman, M.S., CFCS
Program Manager
Office of Health Facility
Licensure and Certification

SLD:mia
Enclosure

cc: Mr. Robert Bible, Attorney
Commission on Aging
Adult Protective Services
St. Fire Marshal's Office

OFFICE OF HEALTH FACILITY LICENSURE
AND CERTIFICATION
1900 Kanawha Boulevard East, Building 3, Room 550
Charleston, WV 25305
Telephone: (304)558-0050

In re: Buckhannon Board & Care, Inc. #1
Shirley Dean, Administrator
P.O. Box 474 (Mailing Address)
4 Cleveland Avenue (Facility Address)
Buckhannon, West Virginia 26201

ORDER

Pursuant to West Virginia Code, §§ 16-5C-6, 16-5H-2 and the regulations duly promulgated thereunder, the Office of Health Facility Licensure and Certification hereby DENIES your application for licensure as a Residential Board and Care Home.

The grounds upon which this action is taken are as follow:

1. The application is incomplete, in that:

a. The State Fire Marshal has made a recommendation that no license be issued.

You are ORDERED to refrain from admitting any further residents to the above facility, to cease operating as a Residential Board and Care Home, and to effect relocation of your existing population within thirty (30) days of receipt of this Order.

Be advised of the availability of a hearing pursuant to W.Va. Code, § 16-5C-12, should you feel aggrieved by this Order. Any request for hearing must be had in this office within ten (10) days of receipt of this Order.

ENTERED this 18th day of October, 1996.

s/ Nancy Tyler
Nancy Tyler, Director
Office of Health Facility
Licensure and Certification

STATE OF WEST VIRGINIA
DEPARTMENT OF HEALTH AND
HUMAN RESOURCES

Gaston Caperton
Governor

October 18, 1996

Buckhannon Board & Care, Inc. #2
Shirley Dean, Administrator
P.O. Box 474 (Mailing Address)

4 Cleveland Avenue (Facility Address)
Buckhannon, West Virginia 25201

Re: Buckhannon Board & Care, Inc. #2

Dear Ms. Dean:

Enclosed you will find an order issued by the Director of the Office of Health Facility Licensure and Certification (OHFLAC) for your failure to comply with West Virginia Residential Board and Care Home regulations.

If you have any questions regarding this order you can contact me using the address or phone number below.

Sincerely,
s/ Sandra L. Daubman
Sandra L. Daubman, M.S., CFCS
Program Manager
Office of Health Facility
Licensure and Certification

SLD:mia
Enclosure

cc: Mr. Robert Bible, Attorney
Commission on Aging
Adult Protective Services
St. Fire Marshal's Office

OFFICE OF HEALTH FACILITY LICENSURE
AND CERTIFICATION
1900 Kanawha Boulevard East, Building 3, Room 550

Charleston, WV 25305
Telephone: (304)558-0050

In re: Buckhannon Board & Care, Inc. #2
Shirley Dean, Administrator
P.O. Box 474 (Mailing Address)
4 Cleveland Avenue (Facility Address)
Buckhannon, West Virginia 26201

ORDER

Pursuant to West Virginia Code, §§ 16-5C-6, 16-5H-2 and the regulations duly promulgated thereunder, the Office of Health Facility Licensure and Certification hereby DENIES your application for licensure as a Residential Board and Care Home.

The grounds upon which this action is taken are as follow:

1. The application is incomplete, in that:

   a. The State Fire Marshal has made a recommendation that no license be issued.

You are ORDERED to refrain from admitting any further residents to the above facility, to cease operating as a Residential Board and Care Home, and to effect relocation of your existing population within thirty (30) days of receipt of this Order.

Be advised of the availability of a hearing pursuant to W.Va. Code, § 16-5C-12, should you feel aggrieved by this

Order. Any request for hearing must be had in this office within ten (10) days of receipt of this Order.

ENTERED this 18th day of October, 1996.

s/ Nancy Tyler
Nancy Tyler, Director
Office of Health Facility
Licensure and Certification

STATE OF WEST VIRGINIA
DEPARTMENT OF HEALTH AND
HUMAN RESOURCES

Gaston Caperton
Governor

October 18, 1996

Buckhannon Board & Care, Inc. #3
Shirley Dean, Administrator
P.O. Box 474 (Mailing Address)
4 Cleveland Avenue (Facility Address)
Buckhannon, West Virginia 25201

Re: Buckhannon Board & Care, Inc. #3

Dear Ms. Dean:

Enclosed you will find an order issued by the Director of the Office of Health Facility Licensure and Certification

(OHFLAC) for your failure to comply with West Virginia Residential Board and Care Home regulations.

If you have any questions regarding this order you can contact me using the address or phone number below.

Sincerely,
s/Sandra L. Daubman
Sandra L. Daubman, M.S., CFCS
Program Manager
Office of Health Facility
Licensure and Certification

SLD:mia
Enclosure

cc: Mr. Robert Bible, Attorney
Commission on Aging
Adult Protective Services
St. Fire Marshal's Office

OFFICE OF HEALTH FACILITY LICENSURE
AND CERTIFICATION
1900 Kanawha Boulevard East, Building 3, Room 550
Charleston, WV 25305
Telephone: (304)558-0050

In re: Buckhannon Board & Care, Inc. #3
Shirley Dean, Administrator
P.O. Box 474 (Mailing Address)
4 Cleveland Avenue (Facility Address)
Buckhannon, West Virginia 26201

ORDER

Pursuant to West Virginia Code, §§ 16-5C-6, 16-5H-2 and the regulations duly promulgated thereunder, the Office of Health Facility Licensure and Certification hereby DENIES your application for licensure as a Residential Board and Care Home.

The grounds upon which this action is taken are as follow:

1. The application is incomplete, in that:

   a. The State Fire Marshal has made a recommendation that no license be issued.

You are ORDERED to refrain from admitting any further residents to the above facility, to cease operating as a Residential Board and Care Home, and to effect relocation of your existing population within thirty (30) days of receipt of this Order.

Be advised of the availability of a hearing pursuant to W.Va. Code, § 16-5C-12, should you feel aggrieved by this Order. Any request for hearing must be had in this office within ten (10) days of receipt of this Order.

ENTERED this 18th day of October, 1996.

s/ Nancy Tyler
Nancy Tyler, Director
Office of Health Facility
Licensure and Certification

87 CSR 1

TITLE 87
LEGISLATIVE RULES
FIRE COMMISSION

SERRIES 1
FIRE CODE

§ 87-1-4. National Standards and Codes.

4.1. Incorporated of National Standards and Codes - The standards and requirements as set out and established by the 1994 edition of "The National Fire Codes" published by the National Fire Protection Association. [The National Fire Protection Association (NFPA) organized in 1896 is an independent, voluntary membership, nonprofit (tax-exempt) organization and has as it's mission the safeguarding of people, their property, and the environment from destructive fire, using scientific and engineering techniques and education] and the State Building Code, but not including standards and requirements directed to the operation of local fire departments, NFPA 101M and Chapters 22 and 23 of NFPA 101 and have the same force and effect as if set out verbatim in this rule and are hereby adopted and promulgated by the State Fire Commission as a part of the State Fire Code. The State Fire Marshal shall make use of the standards and requirements within the publications in all matters coming under his or her jurisdiction. A copy of The National Fire Codes has been filed with the Secretary of State and a copy of the Table of Contents of said publication is included in Section 4.5 of this rule. Information regarding the purchase of The National Fire Code (or separate volumes thereof) may be obtained by writing to the

National Fire Protection Association, Batterymarch Park, Quincy, Massachusetts 02269.

§ 87-1-14. Miscellaneous Provisions.

14.7. Residential Board and Care Occupancies

Application: All facilities classified as residential board and care occupancies shall conform to the following requirements:

Definitions:

Residential Board and Care Occupancy. A building or part of a building used to provide lodging, boarding, and personal care services for four (4) up to and including ten (10) residents unrelated by blood or marriage to its owners or operators.

Personal Care. "Personal Care" means protective care of a resident who does not require chronic or convalescent medical or nursing care. Personal care involves responsibility for the safety of the resident when in the building. Protective care may include a daily awareness by the management of the resident's functioning and his or her whereabouts, the arrangement of appointments and reminders of appointments for a resident, the ability and readiness to intervene if a crisis arises for a resident, supervision in areas of nutrition and medication, and actual provision of transient medical care.

Self-preservation. A person is capable of removing his or her physical self from situations involving imminent danger, such as fire.

Other definitions applicable to these requirements can be found in NFPA 101, Life Safety Code.

Requirements:

(1) All residents shall be capable of self-preservation.

* * *

[Case Style Omitted]

DEFENDANT'S ANSWER TO THE COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND MONETARY DAMAGES

Comes now Defendant West Virginia Office of the State Fire Marshal, Walter Smittle, Fire Marshal, by counsel, Chad M. Cardinal, Assistant Attorney General to answer the complaint filed in the above-styled matter as follows:

First Affirmative Defense

1. Defendant denies all allegations contained in the complaint except as specifically admitted herein.

2. Defendant denies all allegations contained in paragraph nos. 1, 2, 14, 18, 27, 44, 45, 46, 48, 49, 50, 52, 55, 57-63, 68, 69, 71, 72, 74, 75, 77-80 of the complaint.

3. On information and belief, Defendant admits the identity of Plaintiff Buckhannon Board and Care Home, Inc. (hereinafter "BBC") as a corporation who for profit provides

housing and services to elderly people, and further admits on information and belief the street address of BBC as alleged in paragraph no. 3 of the complaint. Defendant Fire Marshal denies all other allegations contained in paragraph no. 3 of the complaint.

4. Defendant on information and belief, admits the identities of Plaintiffs Daisy Layman, and Dorsey Pierce as individuals over the age of 90, who are incapable of "self-preservation" as alleged in paragraph nos. 4 and 5 of the complaint. Defendant denies all other allegations contain in paragraph nos. 4 and 5 of the complaint.

5. On information and belief, Defendant admits the identity of Plaintiff West Virginia Residential Board and Care Home Association as an association of Residential Board and Care Homes. Defendant denies all other allegations contained in paragraph no. 6 of the Complaint.

6. Defendant admits that the West Virginia Department of Health and Human Resources (hereinafter "DHHR") is a department within the executive department of the State of West Virginia. Further, Defendant admits Gretchen O. Lewis is the secretary of DHHR. Defendant denies all other allegations contained in paragraph no. 7 of the complaint.

7. Defendant admits the Office of Health Facility Licensure and Certification is an office within DHHR. On information and belief, Defendant admits that Nancy Tyler and Sandra L. Daubman are respectively the Director and Program Manager of the Office of Health Facility Licensure and Certification. Defendant denies all other allegations contained in paragraph no. 8 of the complaint.

8. Defendant admits that the West Virginia Office of the State Fire Marshal is the administrative body vested with the authority under West Virginia Code to implement and monitor fire safety regulations. Further, Defendant Fire Marshal admits that Walter Smittle is the State Fire Marshal. Defendant denies all other allegations contained in paragraph no. 9 of the complaint.

9. Defendant admits that the West Virginia State Board of Examiners for Registered Professional Nurses is an administrative body which governs the practice of registered nursing within the State of West Virginia. Defendant is without the information to form a belief as to the veracity of the other statements contained in paragraph no. 10 and therefore denies the same.

10. Defendant admits that Gaston Caperton is currently the Governor of the State of West Virginia. Defendant denies all other allegations contained in paragraph no. 11 of the complaint.

11. Paragraph no. 12 of the complaint concerning the formation of the State of West Virginia is admitted.

12. Defendant admits that Plaintiff, BBC is in compliance with the State Fire Code governing the operation of "Residential Board and Care Facilities" (hereinafter "RBCF") which requires, pursuant to National Fire Protection Standard 13d, warning devices and mechanisms designed to provide residents the opportunity to respond to and evacuate the structure. However, Plaintiff BBC is not in compliance with the State Fire Codes governing the operation of facilities designed and licenced to house individuals incapable of

responding to the fire alarms. Defendant denies all other allegations contained in paragraph no. 16 of the complaint.

13. Defendant admits that the West Virginia Code section defines individuals capable of "self-preservation" as having a minimum capacity "of at least removing one's physical self from situations involving eminent danger such as fire." Defendant Fire Marshal denies all other allegations contained in paragraph no. 17 of the complaint.

14. Paragraph no. 22 of the complaint is denied. Plaintiff has obviously failed to notice W. Va. Code § 29-3-16a which requires smoke detectors or sprinkler systems (In compliance with National Fire Protection Standard 13d) in all one and two family dwellings used solely for the purpose of private residential housing. Paragraph no. 22 of the complaint is denied and strict proof is demanded thereof.

15. Inasmuch as paragraph nos. 13, 14, 19, 20, 21, 23, 24, 25, 28, 29, 41, 42, 43, 51, 54 and 56 of the complaint concerns paraphrasing of the laws which speak for themselves as opposed to allegations of fact, same is neither admitted nor denied. Defendant asks the Court to take notice of the complete text of the relevant code sections. Defendant denies all allegations contained in the aforementioned paragraphs of the complaint.

16. Defendant admits that Plaintiffs Daisy Layman and Dorsey Pierce are not capable of exiting from a building, following instructions, or responding to the fire alarm installed in Plaintiff BBC's place of business as alleged in paragraph no. 31 of the complaint. Defendant admits the allegations contained in the aforementioned paragraph.

17. On information and belief, Defendant admits paragraph no. 32 of the complaint.

18. Defendant does not have knowledge or information to form a belief as to the truth of the statements contained in paragraph nos. 15, 26, 30, 33, 34, 36, 37, 38, and 65-67 of the complaint, therefore, deny same.

19. In response to paragraph no. 35 of the complaint, Defendant admits that it conducted an investigation of Plaintiff BBC, however, the Fire Marshal's Office has not cited Plaintiff BBC. No orders or official action on the part of the Fire Marshal's Office, other than recommendations to DHHR, have been made in the above-styled matter. Accordingly, the allegations contained in paragraph no. 35 of the complaint are denied.

20. Defendant denies the allegations contained in paragraph no. 39 of the complaint. As noted in paragraph no. 12 of this answer, though Plaintiff BBC is in compliance with the fire code as it relates to the operation of the "Residential Board and Care Facility," Plaintiff is not in compliance with either the West Virginia Fire Code or National Fire Standards for the operation of a facility which houses individuals who are impractical to evacuate. Accordingly, all allegations contained in paragraph no. 39 of the complaint are denied.

21. Paragraph nos. 40, 53, 64, 70, 73 and 76 of the complaint are neither admitted nor denied as is set forth in this answer.

22. Paragraph no. 47 is denied. Inasmuch as the Plaintiffs have failed to exercise any State administrative remedy concerning the Fire Marshal's recommendation and

sought no exception or accommodation by petitioning the State Fire Commission, pursuant to W. Va. Code § 29-3-18, the allegation contained in paragraph no. 47 as to Defendant Fire Marshal's Office is expressly denied.

23. Defendant denies the Plaintiff is entitled to any of the relief sought.

SECOND AFFIRMATIVE DEFENSE

Plaintiff's claims are barred by the Eleventh Amendment to the United States Constitution.

THIRD AFFIRMATIVE DEFENSE

Plaintiff has failed to state a case or controversy concerning Defendant Fire Marshal. Plaintiff makes no allegation that any controversy exists with the Fire Marshal's Office, and makes no claim that any order or enforcement action has occurred by Defendant. As such, Plaintiff's action against this Defendant is barred by Article 3, Section 2 of the United States Constitution.

FOURTH AFFIRMATIVE DEFENSE

Plaintiff has failed to state a claim upon which relief may be granted.

FIFTH AFFIRMATIVE DEFENSE

Plaintiff has failed to name the proper party. Plaintiff alleges certain defects in the state minimum standards for fire safety and the Fire Code. Pursuant to W. Va. Code § 29-3-5, the State Fire Commission, not the State Fire Marshal (an

independent enforcement office created pursuant to W. Va. Code § 29-3-11) promulgates and repeals regulations for the safeguarding of life and property. Plaintiff has not named the proper State agency to effectuate the relief sought.

SIXTH AFFIRMATIVE DEFENSE

Plaintiff has failed to exhaust their administrative remedies with regard to waiver or modification of the State Fire Code. Pursuant to W. Va. Code § 29-3-18, any person aggrieved by an order or decision of the State Fire Marshal based upon or made in the course of administering his duties may appeal that decision to the State Fire Commission. In the matter at hand, no effort whatsoever has been made to allow the State to address Plaintiffs' regulatory concerns. The Court should abstain from hearing Plaintiff's claims until the appropriate State agencies have had an opportunity to address issues presented.

SEVENTH AFFIRMATIVE DEFENSE

Defendant reserves the right to assert any other affirmative defenses, should a good faith basis for such exist or becomes apparent as discovery into this matter progresses.

Respectfully Submitted,

WEST VIRGINIA OFFICE OF THE
STATE FIRE MARSHAL,
Walter Smittle, Fire Marshall

By counsel,

DARRELL V. McGRAW, JR.

ATTORNEY GENERAL

s/ Chad M. Cardinal
CHAD M. CARDINAL
ASSISTANT ATTORNEY GENERAL
State Capitol, Room E-26
Charleston, West Virginia 25305
(304) 558-2021

[Certificate of Service Omitted]

[Case Style Omitted]

DEFENDANTS WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, GRETCHEN O. LEWIS, Secretary; OFFICE OF HEALTH FACILITY LICENSURE AND CERTIFICATION, NANCY L. TYLER, Director; SANDRA L. DAUBMAN, Program Manger, and THE HONORABLE GASTON CAPERTON, Governor, MOTION TO DISMISS

NOW COME the Defendants, the West Virginia Department of Health and Human Resources, Gretchen O. Lewis, Secretary, the Office of Health Facility Licensure and Certification, Nancy Tyler, Director, Sandra L. Daubman, Program Manager, and The Honorable Gaston Caperton, Governor of the State of West Virginia, by counsel, Charlene A. Vaughan, Deputy Attorney General, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, and moves this Honorable Court to enter an order dismissing Plaintiff's Complaint for Declaratory and Injunctive Relief and Monetary Damages, with prejudice, because Plaintiff's Complaint fails to state a cause of action upon which relief can be granted against

said defendants. Plaintiffs have failed to state a claim under the American with Disabilities Act or the Fair Housing Act Amendments. Plaintiffs Next of Friends lack capacity to sue on behalf of residents at Buckhannon Homes. Plaintiffs Buckhannon Residential Board and Care and the West Virginia Board and Care Association lack standing to seek relief on behalf of residents in residential bed and care homes. In support of their motion to dismiss, the defendants rely upon the attached memorandum of law.

WHEREFORE, because the Plaintiffs have failed to state a cause of action upon which relief can be granted against each of these Defendants, Defendants pray that this Honorable Court grant their motion to dismiss; enter an order dismissing Plaintiff's Complaint against each of them, with prejudice; and, for such other relief as this Honorable Court deems just and proper.

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, GRETCHEN O. LEWIS, OFFICE OF HEALTH FACILITY LICENSURE AND CERTIFICATION, NANCY L. TYLER, and SANDRA L. DAUBMAN

By Counsel

DARRELL V. McGRAW JR.
ATTORNEY GENERAL

s/ Charlene A. Vaughan
CHARLENE A. VAUGHAN
DEPUTY ATTORNEY GENERAL
DEPARTMENT OF HEALTH and
HUMAN RESOURCES

State Capitol Complex
Building 3, Room 210
Charleston, WV 25305
(304) 558-2131

COUNSEL FOR DEFENDANTS
GRETCHEN O. LEWIS,NANCY L.
TYLER, SANDRA L. DAUBMAN, AND
THE HONORABLE GASTON CAPERTON

[Case Style Omitted]

DEFENDANT WEST VIRGINIA FIRE MARSHAL'S OFFICE RENEWED MOTION FOR SUMMARY JUDGMENT IN PART, MOTION TO DISMISS IN PART, and OBJECTIONS to PLAINTIFF'S AMENDED COMPLAINT

In light of Plaintiffs' recently filed amended complaint in the above-styled action, The West Virginia State Fire Marshal's Office, Walter Smittle (hereinafter "Fire Marshal") reaffirms and reincorporates by reference those motions and arguments for dismissal of all Plaintiff's claims for lack of standing and for failure to state a claim, as well as its arguments for summary judgment incorporated by reference and previously submitted in this case. To the extent that Plaintiffs have added new claims, the Fire Marshal Office says as follows:

1. Plaintiff has still failed to allege any adverse action taken by Defendant Fire Marshal. Plaintiff has never sought or requested any modification, waiver or reasonably accommodation under the Fire Code, nor has Plaintiff sought to exercise its state administrative remedies in this regard. As

such, Plaintiff has failed to state a claim that they have been damaged in any way by the operation of the State Fire Code or by actions taken by Defendant State Fire Marshal's Office. Further, Plaintiffs' amended complaint, as to allegations concerning operations of the West Virginia Department of Health and Human Services, Office of Health Facility Licensure and Certification, as well as the operations of the Registered Professional Nursing Board. None of these regulations are promulgated by the State Fire Marshal's Office nor do they relate to the operations of the State Fire Marshal's Office. In the interest of clarity, Fire Marshal would like to point out that they do not consider these allegations touching their office.

2. Fire Marshal's Office incorporates by reference the "A Memorandum of Law in Support of Defendant's West Virginia State Board of Examiners for Registered Professional Nurses, Laura S. Rhodes, Executive Secretary, Renewed Motion For Summary Judgment In Part and Motion to Dismiss In Part In Response to Plaintiffs' Amended Complaint." Filed on January 10, 1997, inasmuch as Title III of the ADA by its very language, only applies to public accommodations and services provided by private entities. As Plaintiffs' allegations concerning the Fire Marshal's Office concern the operation of a state agency, Plaintiffs Title III of the ADA claim must not be accepted.

CONCLUSION

Should the Fire Marshal's motions be denied, we reserve the right to raise the appropriate objections at that time regarding the amended complaint's request for punitive and compensatory damages. Based upon the pleadings thus filed we ask that this Court dismiss all claims against Defendant Fire

Marshal's Office, for no valid or substantive claim has been presented against them.

Respectfully Submitted,
WEST VIRGINIA OFFICE OF THE
STATE FIRE MARSHAL,
WALTER SMITTLE, Fire Marshal

By counsel,

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

s/ Chad M. Cardinal
CHAD M. CARDINAL
ASSISTANT ATTORNEY GENERAL
State Capitol, Room E-26
Charleston, West Virginia 25305
(304) 558-2021

[Certificate of Service Omitted]

[Case Style Omitted]

AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND MONETARY DAMAGES

INTRODUCTION

1. This complaint seeks declaratory and injunctive relief, and monetary damages, under the Fair Housing Amendments Act of 1988, 42 U.S.C. §§ 3601 et seq.

("FHAAA"), and the ADA of 1990, 42 U.S.C. §§ 12101 et seq. ("ADA"). The subject of the complaint is W. Va. Code §§ 16-5C-1 et seq., 29-3-1, et seq., 30-7-1, et seq. and regulations promulgated thereunder. These provisions narrowly define the class of persons who may live in Residential Board and Care Homes ("RBCHs") in West Virginia, and otherwise sharply limit the circumstances under which individuals with mental and physical disabilities may choose to live together. These provisions, both on their face and as applied to the Plaintiffs in this case, are discriminatory housing practices and violate the FHAAA and the ADA. Plaintiffs seek to enjoin Defendants from applying discriminatory standards to homes with disabled adults which are not applied to other homes.

JURISDICTION AND VENUE

2. This Court has jurisdiction over this action pursuant to 28 U.S.C. §1331 (federal question) and 42 U.S.C. § 3613(a)(1)(A) and 42 U.S.C. § 12133. Venue is proper in the Northern District of West Virginia pursuant to 28 U.S.C. § 1391(b) in that, inter alia, the events and omissions giving rise to Plaintiffs' claims occurred in Upshur County, West Virginia.

PARTIES

3. Plaintiff, Buckhannon Board and Care Home, Inc., ("Buckhannon") is a corporation organized and existing under the laws of the State of West Virginia with its principal place of business at Buckhannon, West Virginia. Buckhannon is an "aggrieved person" within the definition of 42 U.S.C. § 3602 (i) and as used in 42 U.S.C. § 3613(a)(1)(A). Buckhannon is associated with, and provides housing to, persons with handicaps as defined in 42 U.S.C. § 3602(h). Buckhannon provides housing to "qualified individuals with a

disability" as defined in 42 U.S.C. § 12131(2). Buckhannon operates three (3) RBCHs which provide housing and services to elderly people who require some assistance with activities of daily living, but who choose to live in a non-institutional setting. These homes are operated by Shirley Dean and are located at the following addresses: 4 Cleveland Avenue, 79 South Florida Street, and 12 Marion Street, Buckhannon West Virginia, 26201.

4. Plaintiff, Almost Home, Inc. ("Almost Home") is a corporation organized and existing under the laws of the State of West Virginia with its principal place of business at Buckhannon, West Virginia. Almost Home is an "aggrieved person" within the definition of 42 U.S.C. § 3602 (i) and as used in 42 U.S.C. § 3613(a)(1)(A). Almost Home is associated with, and provides housing to, persons with handicaps as defined in 42 U.S.C. § 3602(h). Almost Home provides housing to "qualified individuals with a disability" as defined in 42 U.S.C. § 12131(2). Like Buckhannon, Almost Home operates a RBCH. The home is operated by Sharon Oldecker and is located at 18 High Street, Buckhannon, West Virginia 26201.

5. Plaintiff, Daisy Layman is a resident of Buckhannon. She is over 90 years old, is mentally disabled, and is a person with a "handicap" within the meaning of 42 U.S.C. § 3602(h) and a "qualified individual with a disability" within the meaning of 42 U.S.C. § 12131(2). Because Ms. Layman is unable to understand fully the nature of these legal proceedings, she sues through Faye Byers, as her next friend.

6. Plaintiff, Dorsey Pierce, is also a resident of Buckhannon. She is over 90 years old, is mentally disabled, and is a person with a "handicap" within the meaning of 42 U.S.C. § 3602(h) and a "qualified individual with a disability"

within the meaning of 42 U.S.C. § 12131(2). Because Ms. Pierce is unable to understand fully the nature of these legal proceedings, she sues through Lockie J. Marple, as her next friend.

7. Plaintiff, The West Virginia Residential Board and Care Home Association ("WVRBCA"), represents and is comprised of similarly situated residential board and care homes, more fully identified on Exhibit A, attached hereto. These homes provide accommodation and personal assistance to four (4) to ten (10) persons who are not related to the home owner and are dependent upon the services of others by reason of physical or mental impairment. W Va. Code § 16-5C-2(f).

8. Defendant, West Virginia Department of Health and Human Resources ("HHR") is a Department within the Executive Department of the State of West Virginia. HHR is responsible for overseeing, administering, implementing, and enforcing all laws and developing appropriate procedures regarding health policy. Gretchen O. Lewis is the Secretary of HHR and is sued in her official capacity.

9. The Office of Health Facility Licensure and Certification ("OHFLAC") is an office within HHR that adopts, implements, and enforces regulations for the licensure of Residential Board and Care Homes. Nancy Tyler and Sandra Daubman are, respectively, the Director and Program Manager within OHFLAC. Defendants Tyler and Daubman are sued in their official capacities.

10. Defendant, West Virginia Fire Commission ("Fire Commission"), is the administrative body vested with the authority under the West Virginia Code to promulgate, amend and repeal regulations for safeguarding life and property from

the hazards of fire. John Beaty, II, Joseph J. Bostar, III, Randy Breeden, James W. Fife, Francis A. Guffey, II, Daniel Hess, Gregory Alan Lay, David L. Tolliver, Stephen C. McBee, Bill L. Spencer, Victor Stallard, Jr., J. D. Waggoner, and Kenneth Morgan are the State Fire Commissioners and as such, are authorized to enact and repeal the State Fire Regulations. Defendant Commissioners are sued in their official capacity.

11. Defendant, West Virginia Office of the State Fire Marshal ("Fire Marshal"), is the administrative body vested with the authority under the West Virginia Code to implement and monitor fire safety regulations. Walter Smittle is the State Fire Marshal and as such, is authorized to enforce the State Fire Code and underlying Regulations. Defendant Smittle is sued in his official capacity.

12. Defendant, West Virginia State Board of Examiners for Registered Professional Nurses ("Nursing Board"), is the administrative body vested with the authority to govern the practice of registered professional nursing within the state of West Virginia. Laura S. Rhodes is the Executive Director of the Board of Examiners and as such is authorized to enforce the State Nursing Code and Regulations. Defendant Rhodes is sued in her official capacity.

13. The Defendant, Gaston Caperton is the Governor of the State of West Virginia and as such is responsible for employment decisions in the HHR and for the overall enforcement policy. He is named in his official capacity as Governor of West Virginia.

14. The Defendant, State of West Virginia was established by Presidential Proclamation in 1863 as an independent State.

STATUTORY AND REGULATORY BACKGROUND

Office of Health Facility Licensure and Certification

15. The State has enacted a statutory and regulatory scheme, codified at W. Va. Code §§ 16-5C-1, et seq. and accompanying regulations at West Virginia CSR §§ 64-65-1 et seq., (hereinafter collectively referred to as "Chapter 16"), governing the establishment and operation of group homes for persons with disabilities, known as "residential board and care facilities" ("RBCH").

16. The OHFLAC is responsible for enforcing the requirements of Chapter 16. Pursuant to Chapter 16, the OHFLAC may conduct periodic inspections of facilities licensed under Chapter 16, and may issue Deficiency Correction Orders to RBCHs that are not in compliance with the State's regulations.

17. Buckhannon is licensed by the State under Chapter 16. Up to ten persons, including Plaintiffs Daisy Layman and Dorsey Pierce, live at each of the three homes. Between one and four employees staff each Buckhannon site at all times, providing the residents with assistance in their activities of daily living. Similiarly, Almost Home provides identical services to its residents with up to ten persons at its home.

18. In addition to being licensed under Chapter 16, Buckhannon and Almost Home are required to be in full compliance with the State Fire Safety Code governing RBCHs, W. Va. Code §§ 29-3-1 et seq. and West Virginia CSR §§ 87-1-1 et seq.

19. Under W. Va. Code § 16-5C-2(f), only persons meeting the statutory definition of "self-preservation" are permitted to live in Residential Board and Care Facilities. Pursuant to the Fire Safety Code, West Virginia CSR § 64-65-3.32, "self-preservation" is defined as "the capability of , at least, removing one's physical self from situations involving imminent danger, such as fire."

Fire Code

20. The State has enacted a Statutory and regulatory scheme, codified at W. Va. Code §§ 29-3-1 et seq. and accompanying State Regulations, West Virginia CSR §§ 87-1-1 et seq., (hereinafter collectively referred to as "Chapter 29"), which in general govern fire prevention and control within the State.

21. West Virginia CSR § 87-1-14.7 in part mandates all residents of RBCHs shall be capable of self-preservation. "Self-preservation" is defined as the capability of "removing his or her physical self from situations involving imminent danger, such as fire."

22. Among other things, Chapter 29 also mandates that RBCHs must provide:

a. Electrically supervised fire alarm.
b. Automatic sprinkler system.
c. Hardwired smoke detectors.

23. None of these provisions are required for other residential homes.

Nursing Services under OHFLAC

24. OHFLAC regulations further require RBCHs to arrange for a registered professional nurse to assume responsibility for the oversight of nursing care of residents in need of limited and intermittent nursing care. Specifically the applicable provision requires as follows:

> A residential board and care home which provides limited and intermittent nursing care shall arrange for a registered professional nurse to assume responsibility for the oversight of nursing care and services. The home shall enter into a written agreement with the nurse and the home. Arrangements for nursing services may be made by contract with an individual or a nursing service with a management entity; or the residential board and care home may employ a registered nurse; or the administrator of the home may act in this capacity if he or she is a licensed registered professional nurse. Arrangements with a home care agency providing only direct care does not satisfy the requirements for nursing management oversight of all residents. West Virginia CSR § 64-65-12.1.1
>
> The home shall provide adequate nursing support staff to ensure appropriate nursing care outcomes. Nursing support staff shall be under the supervision of the registered professional nurse who has assumed the overall responsibility for the oversight and care provided to the residents. West Virginia CSR § 64-65-12.1.2

25. The above regulations place additional requirements on RBCHs that are not placed on personal residences. Individuals in personal residences may contract with home health agencies or visiting nursing to provide nursing care in such situations.

26. Residents of RBCHs are generally elderly and eligible and qualified for Medicare. Medicare pays for the health care costs of people over 65, 42 U.S.C. § 1395. Home health services, is one Medicare benefit that provides care to a beneficiary who is confined to his home, under a physician's care, and in need of part-time or intermittent nursing care. Medicare home health services can be furnished by a Medicare certified home health agency.

27. RBCHs are not Medicare certified home health agencies and do not provide home health or nursing services and accordingly, do nor receive any Medicare funding. Residents of RBCHs, like individuals in personal residences, can and do occasionally need limited and intermittent nursing care and can individually contract with a home health agency to provide such services.

Nursing Act

28. The State has enacted as statutory and regulatory scheme codified at W. Va. Code §§ 30-7-1 et seq. and accompanying State regulations, West Virginia CSR §§ 19-10-1.1 et seq. (hereinafter collectively referred to as "Chapter 30" or "Nursing Act") which governs the practice of professional nursing in the State.

29. W. Va. Code § 30-7-1 defines the "practice of Registered Nursing" as:

the performance for compensation of any service requiring substantial specialized judgment and skill based on knowledge and application of principles of nursing derived from the biological, physical and social sciences, such as responsible supervision of a patient requiring skill in observation of symptoms and reactions and the accurate recording of the facts, or the supervision and teaching of other persons with respect so such principles of nursing, or in the administration of medications and treatments as prescribed by a licensed physician or a licensed dentist, or the application of such nursing procedures as involve understanding of cause and effect in order to safeguard life and health of a patient and others. (emphasis added)

30. West Virginia CSR § 19-10-3 provides inter alia:

> 3.10 The registered professional nurse shall delegate to another only those nursing measures which that person is prepared or qualified to perform.
>
> 3.11 The registered professional nurse shall supervise others to whom nursing interventions are delegated.
>
> 3.12 The registered professional nurse shall retain professional accountability for nursing care when delegating nursing interventions.

31. The Nursing Board has interpreted the above provisions to prohibit the administering of any medications, by anyone other than a registered professional nurse.

Similarly Situated Residents and Homes

32. The self preservation provisions of West Virginia CSR §§ 64-65-3.32 and 87-1-14.7 applies to RBCHs with 4 to 10 residents. By definition, RBCHs with 1 to 3 residents are not subject to either Chapter 16 or Chapter 29. The effect has been a drastic increase in the number of unregulated homes with three residents. The number of these homes has increased to approximately 250. Exhibit B.

33. Fraternal organizations are permitted to develop and operate homes and asylums for the care and support of orphans and widows of deceased members, and of disabled and aged members in indigent circumstances. The fraternal operated homes are not subject to Chapters 16 and 29. These homes are self-governed:

> Any such grand lodge desiring to establish a home or asylum shall adopt and prescribe such rules an regulations for the government and control thereof as may be deemed wise by such grand body; and it shall appoint a board of directors, trustees, regents or commissioners, composed of a specified number of persons from its own membership, not fewer than seven nor more than eleven, to serve for definite periods; and any such grand lodge may select for each of such boards two members from the associate branches of the orders, known as Pythian Sisters, Rebekahs, Eastern Star, or other

like organizations, as the case may be. Such board shall have the management and control of the home or asylum for which it is appointed, under the prescribed rules and regulations adopted by said body for the government thereof. Such board of directors, trustees, regents or commissioners shall organize by the election of a president, secretary and treasurer, and , if necessary or expedient, an executive committee, all from its own membership. W. Va. Code §35-3-2.

34. Group residential facilities are subject to different and less stringent regulations than RBCHs. W. Va. Code § 27-17-1 defines a "Group residential facility" as a facility which:

(1) Provides residential services and supervision for individuals who are developmentally disabled or behaviorally disabled; (2) is occupied as a residence by not more than eight individuals who are developmentally disabled and not more than three supervisors, or is occupied as a residence by not more than twelve individuals who are behaviorally disabled and not more than three supervisors; (3) is licensed by the department of health or the department of human services; and (4) complies with the state fire commission for residential facilities.

Group residential facilities are not subject to the requirements of Chapters 16 and 29.

35. Residents who do not qualify under the "self preservation" definition may reside in an RBCH if they are receiving hospice care.

36. The self-preservation clause does not apply to personal residences.

STATE ACTION AND FACTUAL BACKGROUND

Self-Preservation

37. Neither Daisy Layman nor Dorsey Pierce is capable of "self-preservation" within the meaning of Chapters 16 or 29, because neither is independently capable of exiting from a building, following instruction and responding to an alarm. Both are, however, capable of safely exiting with available staff assistance. Similar individuals reside at Almost Home.

38. On January 30, 1996, an inspector from OHFLAC, inspected Buckhannon, and issued a Statement of Deficiency on the grounds that, because of their handicaps, ie their lack of mobility to exit the premises without assistance, they did not meet the definition of "self-preservation."

39. Buckhannon's Plan of Correction was rejected because the residents in question would not be evicted from Buckhannon and transferred to a nursing home. A true and accurate copy of the February 1996 Deficiency Statement and related documents is attached hereto as Exhibit C.

40. A second OHFLAC inspection occurred on September 3, 1996. Buckhannon was again cited for failing to comply with the "self-preservation" rule. Exhibit D.

41. The State Fire Marshal also conducted an investigation of Buckhannon. Buckhannon was cited for failure to meet the Chapter 29 definition of "self-preservation".

42. Following the issuance of the Deficiency Statements, Buckhannon attempted to persuade the Defendants to make reasonable accommodations for Ms. Layman and Ms. Pierce. An exception to the "self-preservation" rule, was permissible in the past, which permitted Ms. Layman and Ms. Pierce to remain at Buckhannon. Specifically, prior to 1996, OHFLAC permitted residents to Waive enforcement of the self-preservation. Attached as Exhibits E & G are copies of such Waivers. The Defendants refused to accommodate Buckhannon's requests for exception.

43. On October 18, 1996, Buckhannon received an Order from OHFLAC to cease operating as a RBCH and to relocate all residents within thirty (30) days. Exhibit F. An identical Order was received on or about October 24, 1996 by Almost Home. Exhibit H.

44. The care provided Daisy Layman and Dorsey Pierce at Buckhannon is well suited to their needs. Neither is in need of expensive nursing care; both require only custodial care. Buckhannon provides an important service by preventing premature institutionalization in accordance with the statutory purpose of Chapter 16, stated as follows:

> It is the policy of this State to encourage and promote the development and utilization of resources to ensure the effective care and treatment of persons who are convalescing or whose physical or mental condition requires them to receive a degree of nursing or related

> health care greater than that necessary for well individuals, but not so acute as to require hospitalization. Such care and treatment requires a living environment for such persons which, to the extent practicable, will approximate a normal home environment. To this end, the guiding principle for administration of the laws of the State is that such persons shall be encouraged and assisted in securing necessary care and treatment in noninstitutional surroundings. In recognition that for many such persons effective care and treatment can only be secured from proprietary, voluntary and governmental nursing homes or personal care homes it is the policy of this State to encourage, promote and require the maintenance of institutions other than hospitals offering nursing or related health care or personal care so as to ensure protection of the rights and dignity of those using the services of such facilities. W. Va. Code § 16-5-C-1 (emphasis added).

45. Moreover, both wish to remain at Buckhannon, and their families want them to remain at Buckhannon. The homes are located near their families and the cost of care is well below that which would be charged by a nursing facility. Further, the homes of Buckhannon and Almost Home are in full compliance with the fire code including, among others, smoke detectors and sprinkler systems, as well as around the clock supervision. All of these factors eliminate any fire safety concerns.

CAUSES OF ACTION

COUNT I
(FHAAA as it relates to "self-preservation")

46. The Plaintiffs reallege and incorporate herein the allegations contained in Paragraphs 1 through 45 as though fully set forth herein.

47. The FHAAA prohibits discrimination on the basis of a physical or mental handicap. Section 3604(f)(1) of the Act makes it unlawful [t]o discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of :

(a) that buyer or renter;
(b) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or
(c) any person associated with that buyer or renter.

48. Similarly, it is unlawful to discriminate against any person in the "terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling because of a handicap of that person." 42 U.S.C. § 3604(f)(2).

49. The FHAA, also makes it unlawful to coerce, intimidate, or retaliate against someone for having exercised rights protected by the FHAA. 42 U.S.C. § 3617. Furthermore, the FHAA requires defendants to make "reasonable accommodations in rules, policies, practices, or services," when such accommodations would enable a person with disabilities to live where he or she chooses. 42 U.S.C. § 3604(f)(3)(B).

50. Plaintiffs, Daisy Layman and Dorsey Pierce, are handicapped persons or persons associated with handicapped persons within the meaning of 42 U.S.C. § 3602(h).

51. By virtue of their definition of "self-preservation," Chapters 16 and 29 effectively prohibit any person with the handicap of dementia from living in a group home. The Chapters also prohibit a person with quadriplegia or heimplesia from living in such a home under most circumstances, as well as adults and children with severe or profound mental retardation or acute mental illness. Moreover, it prohibits individuals suffering from normal degenerative aging ailments from residing in group homes.

52. The Chapters 16 and 29 definition of "self-preservation" is not applied to residents of all group homes or other residences, but is selectively applied to residents of RBCHs housing the elderly.

53. The Defendants have refused to make an exception or accommodation in their regulations which would permit Daisy Layman and Dorsey Pierce to continue living at Buckhannon.

54. Defendants' actions as described above are taken with the intent to discriminate and have the effect of discriminating against persons with handicaps.

55. Defendants' actions as described above have injured and are injuring the Plaintiffs. Buckhannon has expended considerable resources in seeking a modification of the "self-preservation" rule for Daisy Layman and Dorsey Pierce, and if Daisy Layman and Dorsey Pierce are indeed evicted, Buckhannon will suffer a loss of income. Moreover,

the events surrounding the issuance of the Cease and Desist Order have had a demoralizing effect on Buckhannon staff and residents. Plaintiffs Daisy Layman and Dorsey Pierce are being denied their civil rights to live where they wish. Both Daisy Layman and Dorsey Pierce, as well as their families, have experienced significant emotional distress because of the eviction notice, and the possibility that they will be institutionalized.

56. The Chapters 16 and 29 definition of "self-preservation," both on its face and as applied to these Plaintiffs, violates Plaintiffs' rights under the FHAAA, 42 U.S.C. §§ 3604(f) and 3617, by:

(a) imposing a term or condition on Plaintiffs that is not imposed on people without handicaps;

(b) denying or otherwise making housing unavailable to Plaintiffs on the basis of their handicaps;

(c) failing to make reasonable accommodations which would enable Plaintiffs to remain in their home;

(d) interfering with the rights of Plaintiffs to live in the housing of their choice.

57. Article VI of the United States Constitution, otherwise known as the Supremacy Clause, provides in pertinent part:

> This Constitution and the Laws of the United States which shall be made in pursuance thereof...shall be the Supreme Law of the Land; and Judges in every State shall be bound thereby, anything in the Constitution of Laws of any State to the contrary notwithstanding.

58. The Chapters 16 and 29 definition of "self preservation" is in violation of the FHAA and is preempted by the FHAA and Article VI, United State Constitution.

COUNT II

(Title II of the ADA as it relates to "self-preservation")

59. The Plaintiffs reallege and incorporate herein the allegations contained in Paragraphs 1 through 58 as though fully set forth herein.

60. Title II of the ADA prohibits discrimination on the basis of a disability by a public entity. Section 12132 provides that:

> No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity. 42 U.S.C. § 12132.

61. Plaintiffs, Daisy Layman and Dorsey Pierce, are qualified individuals with a disability within the meaning of 42 U.S.C. § 12131(2).

62. Article VI of the United States Constitution, otherwise known as the Supremacy clause, provides in pertinent part:

> This Constitution and the Laws of the United States which shall be made in pursuance thereof...shall be the Supreme Law of the Land; and Judges in every State shall be bound

thereby, anything in the Constitution of Laws of any State to the contrary notwithstanding.

63. By virtue of their definition of "self-preservation," Chapters 16 and 29 effectively prohibit any person with the disability of dementia from living in a group home. The Chapters also prohibit a person with quadriplegia or heimplesia from living in such a home under most circumstances, as well as adults and children with severe or profound mental retardation or acute mental illness. Moreover, it prohibits individuals suffering from normal degenerative aging ailments from residing in group homes.

64. The Chapters 16 and 29 definition of "self-preservation" is not applied to residents of all group homes or other residences, but is selectively applied to residents of RBCHs that house the elderly.

65. The Defendants have refused to make an exception or accommodation in their regulations which would permit Daisy Layman and Dorsey Pierce to continue living at Buckhannon.

66. Defendants' actions as described above are taken with the intent to discriminate and have the effect of discriminating against persons with disabilities and the aged.

67. Defendants' actions as described above have injured and are injuring the Plaintiffs. Buckhannon has expended considerable resources in seeking a modification of the "self-preservation" rule for Daisy Layman and Dorsey Pierce, and if Daisy Layman and Dorsey Pierce are indeed evicted, Buckhannon will suffer a loss of income. Moreover, the events surrounding the issuance of the Cease and Desist

Order have had a demoralizing effect on Buckhannon staff and residents. Plaintiffs Daisy Layman and Dorsey Pierce are being denied their civil rights to live where they wish. Both Daisy Layman and Dorsey Pierce, as well as their families, have experienced significant emotional distress because of the eviction notice, and the possibility that they will be institutionalized.

68. The Chapters 16 and 29 definition of "self-preservation", both on its face and as applied to Plaintiffs Daisy Layman and Dorsey Pierce, violates Plaintiff's rights under Title II of the ADA, 42 U.S.C. §12131 and 12132, and the regulations promulgated thereunder, 28 C.F.R. §35.130, by:

(a) denying the Plaintiffs, by reason of their disabilities, the opportunity to participate in or benefit from the services and programs offered by Buckhannon;

(b) subjecting the Plaintiffs, by reason of their disabilities, to discrimination;

(c) denying the Plaintiffs an opportunity to participate in a program in the most integrated setting appropriate to their needs;

(d) imposing and applying eligibility criteria that screen out the Plaintiffs from fully and equally enjoying the services and program offered by Buckhannon;

(e) denying the Plaintiffs an opportunity to participate in or benefit from the services and program offered by Buckhannon that is equal to that of older people without disabilities.

69. The Chapters 16 and 29 definition of "self preservation" is in violation of Title II of the ADA and is preempted by the ADA and Article VI, United States Constitution.

COUNT III

(Title III of the ADA as it relates to "self-preservation")

70. The Plaintiffs reallege and incorporate herein the allegations contained in Paragraphs 1 through 69 as though fully set forth herein.

71. Title III of the ADA prohibits discrimination on the basis of a disability by a private entity that operates a public accommodation. Section 12182 provides that:

> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation. 42 U.S.C. § 12182.

72. Plaintiffs, Daisy Layman and Dorsey Pierce, are qualified individuals with a disability within the meaning of 42 U.S.C. § 12102(2).

73. Article VI of the United States Constitution, otherwise known as the Supremacy clause, provides in pertinent part:

> This Constitution and the Laws of the United States which shall be made in pursuance thereof...shall be the Supreme Law of the Land; and Judges in every State shall be bound thereby, anything in the Constitution of Laws of any State to the contrary notwithstanding.

74. By virtue of their definition of "self-preservation," Chapters 16 and 29 effectively prohibit any person with the handicap of dementia from living in a group home. The Chapters also prohibit a person with quadriplegia or heimplesia from living in such a home under most circumstances, as well as adults and children with severe or profound mental retardation or acute mental illness. Moreover, it prohibits individuals suffering from normal degenerative aging ailments from residing in group homes.

75. The Chapters 16 and 29 definition of "self-preservation" is not applied to residents of all group homes or other residences, but is selectively applied to residents of group homes for the elderly.

76. The Defendants have refused to make an exception or accommodation in their regulations which would permit Daisy Layman and Dorsey Pierce to continue living at Buckhannon.

77. Defendants' actions as described above, prevent the Plaintiffs and other similarly situated RBCHS, from providing public accommodations to individuals with disabilities and the State is preventing RBCHs from complying with the provisions of Title III of the ADA and the State's conduct has the effect of discriminating against persons with disabilities and the aged.

78. Defendants' actions as described above have injured and are injuring the Plaintiffs. Buckhannon has expended considerable resources in seeking a modification of the "self-preservation" rule for Daisy Layman and Dorsey Pierce, and if Daisy Layman and Dorsey Pierce are indeed evicted, Buckhannon will suffer a loss of income. Moreover,

the events surrounding the issuance of the Cease and Desist Order have had a demoralizing effect on Buckhannon staff and residents. Plaintiffs Daisy Layman and Dorsey Pierce are being denied their civil rights to live where they wish. Both Daisy Layman and Dorsey Pierce, as well as their families, have experienced significant emotional distress because of the eviction notice, and the possibility that they will be institutionalized.

79. The Chapters 16 and 29 definition of "self-preservation", both on its face and as applied to Plaintiffs Daisy Layman and Dorsey Pierce, violates Plaintiffs' rights under Title III of the ADA, 42 U.S.C. §§ 12181 and 12182, and the regulations promulgated thereunder, 28 C.F.R. §35.130, by:

(a) denying the Plaintiffs, by reason of their disabilities, the opportunity to participate in or benefit from the services and programs offered by Buckhannon;

(b) subjecting the Plaintiffs, by reason of their disabilities, to discrimination;

(c) denying the Plaintiffs an opportunity to participate in a program in the most integrated setting appropriate to their needs;

(d) imposing and applying eligibility criteria that screen out the Plaintiffs from fully and equally enjoying the services and program offered by Buckhannon;

(e) denying the Plaintiffs an opportunity to participate in or benefit from the services and program offered by Buckhannon that is equal to that of older people without disabilities.

80. The Chapters 16 and 29 definition of "self preservation" is in violation of Title III of the ADA and is

preempted by the ADA and Article VI, United States Constitution.

COUNT IV

(FHAAA as it relates to Nursing Services)

81. The Plaintiffs reallege and incorporate herein the allegations contained in Paragraphs 1 through 80 as though fully set forth herein.

82. Residents of RBCHs may occasionally need limited and intermittent nursing care as available from home health agencies.

83. By virtue of West Virginia CSR §§ 64-65-12 et seq., they cannot obtain such services unless the RBCH in which they reside hires a registered nurse or contracts with a home care agency to provide oversight in addition to direct care services.

84. The provisions of West Virginia CSR §§ 64-65-12 et seq. violates and is preempted by the FHAAA and Article VI, United States Constitution by:

(a) imposing a term or condition on Plaintiffs that is not imposed on people without disabilities;

(b) denying or otherwise making housing unavailable to Plaintiffs on the basis of their disabilities;

(c) failing to make reasonable accommodations which would enable Plaintiffs to remain in their home;

(d) interfering with the rights of Plaintiffs to live in the housing of their choice.

85. West Virginia CSR §§ 64-65-12 et seq. is in violation of the FHAA and is preempted by the FHAA and Article VI, United States Constitution.

COUNT V

(Title II of the ADA as it relates to Nursing Services)

86. The Plaintiffs reallege and incorporate herein the allegations contained in Paragraphs 1 through 85 as though fully set forth herein.

87. Residents of RBCHs may occasionally need limited and intermittent nursing care as available from home health agencies.

88. By virtue of West Virginia CSR §§ 64-65-12 et seq., they cannot obtain such services unless the RBCH in which they reside hires a registered nurse or contracts with a home care agency to provide oversight in addition to direct care services.

89. West Virginia CSR §§ 64-65-12 et seq. violates and is preempted by the ADA, and Article VI, United States Constitution by:

(a) imposing a term or condition on Plaintiffs that is not imposed on people without disabilities;

(b) denying or otherwise making housing unavailable to Plaintiffs on the basis of their disabilities;

(c) failing to make reasonable accommodations which would enable Plaintiffs to remain in their home;

(d) interfering with the rights of Plaintiffs to live in the housing of their choice.

90. West Virginia CSR §§ 64-65-12 et seq. is in violation of Title II of the ADA and is preempted by the ADA and Article VI, United States Constitution.

COUNT VI

(Title III of the ADA as it relates to Nursing Services)

91. The Plaintiffs reallege and incorporate herein the allegations contained in Paragraphs 1 through 90 as though fully set forth herein.

92. Residents of RBCHs may occasionally need limited and intermittent nursing care as available from home health agencies.

93. By virtue of West Virginia CSR §§ 64-65-12 et seq., they cannot obtain such services unless the RBCH in which they reside hires a registered nurse or contracts with a home care agency to provide oversight in addition to direct care services.

94. West Virginia CSR §§ 64-65-12 et seq. violates and is preempted by the ADA, and Article VI, United States Constitution by:

(a) imposing a term or condition on Plaintiffs that is not imposed on people without disabilities;

(b) denying or otherwise making housing unavailable to Plaintiffs on the basis of their disabilities;

(c) failing to make reasonable accommodations which would enable Plaintiffs to remain in their home;

(d) interfering with the rights of Plaintiffs to live in the housing of their choice.

95. West Virginia CSR §§ 64-65-12 et seq. is in violation of Title III of the ADA and is preempted by the ADA and Article VI, United States Constitution.

COUNT VII

(FHAAA as it relates to the Nursing Act)

96. The Plaintiffs reallege and incorporate herein the allegations contained in Paragraphs 1 through 95 as though fully set forth herein.

97. Plaintiffs, Daisy Layman and Dorsey Pierce, occasionally need assistance with taking medication.

98. By definition of Chapter 30, this can only be done by a registered professional nurse.

99. By virtue of this Chapter 30 effectively prohibits any person with a handicap from residing anywhere other than an institution with skilled nursing care.

100. The Chapter 30 limitation on the administration of medication, both on its face and as applied to Plaintiffs, Daisy Layman and Dorsey Pierce, violates their rights under the FHAAA by:

(a) imposing a term or condition on Plaintiffs that is not imposed on people without disabilities;

(b) denying or otherwise making housing unavailable to Plaintiffs on the basis of their disabilities;

(c) failing to make reasonable accommodations which would enable Plaintiffs to remain in their home;

(d) interfering with the rights of Plaintiffs to live in the housing of their choice.

101. The Chapter 30 limitation on medication administration violates the FHAA and is preempted by the FHAA and Article VI, United States Constitution.

COUNT VIII

(Title II of the ADA as it relates to the Nursing Act)

102. The Plaintiffs reallege and incorporate herein the allegations contained in Paragraphs 1 through 101 as though fully set forth herein.

103. Plaintiffs, Daisy Layman and Dorsey Pierce, occasionally need assistance with taking medication.

104. By definition of Chapter 30, this can only be done by a registered professional nurse.

105. By virtue of this Chapter 30 effectively prohibits any person with a disability from residing anywhere other than an institution with skilled nursing care.

106. The Chapter 30 limitation on the administration of medication, both on its face and as applied to Plaintiffs Daisy Layman and Dorsey Pierce, violates their rights under Title II of the ADA by:

(a) denying the Plaintiffs, by reason of their disabilities, the opportunity to participate in or benefit from the services and programs offered by Buckhannon;

(b) subjecting the Plaintiffs, by reason of their disabilities, to discrimination;

(c) denying the Plaintiffs as opportunity to participate in a program in the most integrated setting appropriate to their needs;

(d) imposing and applying eligibility criteria that screen out the Plaintiffs from fully and equally enjoying the services and program offered by Buckhannon;

(e) denying the Plaintiffs an opportunity to participate in or benefit from the services and program offered by Buckhannon that is equal to that of older people without disabilities.

107. The Chapter 30 limitation on medication administration violates the ADA and is preempted by Title II of the ADA and Article VI, United States Constitution.

COUNT IX

(Title III of the ADA as it relates to the Nursing Act)

108. The Plaintiffs reallege and incorporate herein the allegations contained in Paragraphs 1 through 107 as though fully set forth herein.

109. Plaintiffs, Daisy Layman and Dorsey Pierce, occasionally need assistance with taking medication.

110. By definition of Chapter 30, this can only be done by a registered professional nurse.

111. By virtue of this Chapter 30 effectively prohibits any person with a disability from residing anywhere other than an institution with skilled nursing care.

112. The Chapter 30 limitation on the administration of medication, both on its face and as applied to Plaintiffs Daisy Layman and Dorsey Pierce, violates their rights under Title III of the ADA by:

(a) denying the Plaintiffs, by reason of their disabilities, the opportunity to participate in or benefit from the services and programs offered by Buckhannon;

(b) subjecting the Plaintiffs, by reason of their disabilities, to discrimination;

(c) denying the Plaintiffs as opportunity to participate in a program in the most integrated setting appropriate to their needs;

(d) imposing and applying eligibility criteria that screen out the Plaintiffs from fully and equally enjoying the services and program offered by Buckhannon;

(e) denying the Plaintiffs an opportunity to participate in or benefit from the services and program offered by Buckhannon that is equal to that of older people without disabilities.

113. The Chapter 30 limitation on medication administration violates the ADA and is preempted by Title III of the ADA and Article VI, United States Constitution.

COUNT X

(Discriminatory Treatment of Similarly Situated Homes)

114. The Plaintiffs reallege and incorporate herein the allegations contained in Paragraphs 1 through 113 as though fully set forth herein.

115. The State of West Virginia has selectively and arbitrarily enacted and applied onerous laws and regulations governing RBCHs. In contrast, homes and asylums of fraternal orders, group residential facilities, RBCHs with less than 4 residents, and hospice patients residing in RBCHs are all exempted from these same or similar laws and regulations.

116. The Defendants' enactment and application of extensive and onerous laws and regulations of Chapters 16 and 29 to RBCHs, while exempting other similarly situated homes and residents, is arbitrary and capricious and violates equal protection and Due Process guarantees of the Constitutions of the United States and West Virginia.

COUNT XI

(Preliminary and Permanent Injunctive Relief)

117. The Plaintiffs reallege and incorporate herein the allegations contained in Paragraphs 1 through 116 as though fully set forth herein.

118. The enforcement of the Cease and Desist Order issued by OHFLAC to Buckhannon on October 18, 1996 and Almost Home on October 24, 1996, and any others issued to similarly situated RBCHs will cause the Plaintiffs irreparable harm for which they have no adequate remedy at law. Such irreparable harm consists of the eviction of thirty residents against their will for which there are no alternatives other than relocation to a nursing home for costs in excess of double those currently incurred by residents of RBCH's. Buckhannon and

other RBCHs and their employees will likewise suffer irreparable harm through loss of income. Such losses are incapable of being determined so as to allow an award of damages as a remedy at law.

119. Plaintiffs fear retaliation by the State of West Virginia, through its Departments, Bureaus, Divisions and officers identified herein, as a result of filing this Complaint. For example, OHFLAC has great latitude and discretion with regard to inspections and enforcement of Chapter 16. The Plaintiff's fear the Defendants may take further action, impose civil penalties or revoke or deny other licenses.

120. Based upon information and belief, some RBCHs declined to join this action because of this fear. Despite the fear of reprisal, the Plaintiffs' have resolved that their homes are in jeopardy and serious risk of closure or insolvency.

121. The harm to the Plaintiff's in the absence of injunctive relief outweighs the potential harm to the Defendants should they prevail on the merits, if injunctive relief is granted by this Court.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request that this Court grant the following relief:

(a) To enter a Declaratory Judgment that the "self-preservation" definition under Chapter 16 is in violation of and preempted by the FHAAA, 42 U.S.C. §§ 3601 et. seq.; and Title II and III of the ADA, 42 U.S.C. §§ 12101 et. seq.;

(b) To enter a Declaratory Judgment that the "self-preservation" definition under Chapter 29 as it applies to RBCH's, which comply with all Fire Code provisions, W. Va. Code §§ 29-3-1 et seq. and West Virginia CSR § 87-1-14.7, is in violation of and preempted by the FHAAA and Title II and III of the ADA.;

(c) To enter a Declaratory Judgment that the Fire Code requirements of W. Va. Code §§ 39-3-1 et seq. and West Virginia CSR § 87-1-14.7 that specify that an electrically supervised fire alarm, automatic sprinkler system, and hardwired smoke detectors as it applies to RBCH's which do not house individuals incapable of self-preservation is in violation of and preempted by the FHAAA and Title II and III of the ADA;

(d) Preliminarily and permanently enjoin the Defendants, State of West Virginia, HHR, OHFLAC, Fire Commission and Fire Marshal, their agents, and employees, and successors, from enforcing any orders that Daisy Layman and Dorsey Pierce, or other similarly situated residents, be evicted from Buckhannon, and from otherwise enforcing its "self-preservation" rule against Buckhannon, Almost Home or any other RBCH;

(e) To enter a Declaratory Judgment that the Nursing Services requirement of West Virginia CSR §§ 64-65-12.1 et seq. is in violation of and preempted by the FHAAA, 42. U.S.C. §§ 3601 et seq. and Title II and III of the ADA, 42 U.S.C. §§ 12101 et seq.

(f) To enter a Declaratory Judgment that the "administration of medication" limitation of the Nursing Board is overly broad and in violation of and preempted by the

FHAAA, 42 U.S.C., §§ 3601 et seq and Title II and III of the ADA, 42 U.S.C. §§ 12101 et seq;

(g) Preliminarily and permanently enjoin the State of West Virginia, the Governor, HHR, the HHR Secretary, OHFLAC, OHFLAC Director, Nursing Board, the Nursing Board Executive Secretary, including their agents, officers and employees thereof, from taking any action against any participating RBCH until a hearing is held and a decision rendered in this matter.

(h) To enter a Declaratory Judgment that Chapters 16 and 29 insofar as they discriminate against RBCHs by applying different laws and regulations than other similarly situate homes is void as a violation of the United States Constitutional guarantees of Due Process and Equal Protection.

(i) Award appropriate punitive and compensatory damages to the Plaintiffs and against Defendants;

(j) Award the Plaintiffs their costs and reasonable attorneys' fees in this action; and,

(k) Order such other relief as this Court deems just and proper.

BUCKHANNON BOARD AND CARE HOME, INC; ALMOST HOME, INC.; THE WEST VIRGINIA RESIDENTIAL BOARD AND CARE HOME ASSOCIATION; DAISY LAYMAN, by her next friend, FAYE BYERS; DORSEY PIERCE, by her next friend LOCKIE J.

MARPLE, and on behalf of all others similarly situated.

By Counsel

LEWIS, FRIEDBERG, GLASSER, CASEY & ROLLINS, LLP

s/ Webster J. Arceneaux, III
Webster J. Arceneaux, III
Chad B. McIntosh
Post Office Box 1746
Charleston, West Virginia 25326
(304) 345-2000

[Verifications and Exhibits Omitted]

[Style Abbreviated]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
WEST VIRGINIA

BUCKHANNON BOARD AND CARE HOME, INC., et al.

Plaintiffs,

v. Civil Action No. 2:96CV106 (STAMP)

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, et al.

Defendants.

MEMORANDUM OPINION AND ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, GRETCHEN O. LEWIS, OFFICE OF HEALTH FACILITY LICENSURE AND CERTIFICATION, NANCY TYLER, SANDRA L. DAUBMAN AND GASTON CAPERTON'S MOTION TO DISMISS, DENYING DEFENDANTS WEST VIRGINIA STATE BOARD OF EXAMINERS FOR REGISTERED PROFESSIONAL NURSES AND LAURA S. RHODES' MOTION FOR SUMMARY JUDGMENT IN PART AND MOTION TO DISMISS IN PART AND DENYING DEFENDANTS WEST VIRGINIA OFFICE OF THE STATE FIRE MARSHAL AND WALTER SMITTLE'S RENEWED MOTION FOR SUMMARY JUDGMENT IN PART AND MOTION TO DISMISS

I. Procedural History

On October 28, 1996, plaintiffs filed this civil action in this Court, alleging violations of the Americans with Disabilities Act ("ADA") and the Fair Housing Amendments Act ("FHAA"). Plaintiffs sought declaratory and injunctive relief in addition to money damages. On November 18, 1996, defendants West Virginia Department of Health and Human Resources ("HHR"), Gretchen O. Lewis ("Lewis"), Office of Health Facility Licensure and Certification ("OHFLAC"), Nancy Tyler ("Tyler"), Sandra L. Daubman ("Daubman"), and Gaston Caperton ("Caperton") filed a motion to dismiss. On November 22, 1996, defendants West Virginia Office of the State Fire Marshal ("Fire Marshal") and Walter Smittle

("Smittle") joined in that motion. On December 6, 1996, plaintiffs, Buckhannon Board and Care Home, Inc. ("Buckhannon"), the West Virginia Board and Care Home Association ("Association"), Daisy Layman by her next friend Faye Byers, and Dorsey Pierce by her next friend Lockie J. Marple, responded to that motion. On December 16, 1997, defendants the West Virginia State Board of Examiners for Registered Nurses ("Board") and Laura S. Rhodes ("Rhodes") filed a reply to plaintiffs' response. On December 30, 1996, defendants HHR, Lewis, OHFLAC, Tyler, Daubman, and Caperton filed a reply in support of their motion to dismiss.

On November 20, 1996, the Board and Rhodes filed a motion for summary judgment in part and a motion to dismiss in part. On December 30, 1996, plaintiffs filed a motion to amend the complaint. On January 13, 1997, defendants HHR, Caperton, the Board and Rhodes responded to that motion. On that same date, the Fire Marshal and Smittle filed a "Renewed Motion for Summary Judgment In Part and a Motion to Dismiss in Part and Objections to Plaintiff's [sic] Amended Complaint." On January 23, 1997, plaintiffs filed a reply in support of their motion to amend the complaint. On February 2, 1997, this Court granted plaintiffs' motion to amend the complaint and plaintiffs filed the amended complaint.

For the reasons set forth below, this Court finds: (1) defendants' motion to dismiss should be granted in part and denied in part, (2) the motion for summary judgment in part and to dismiss in part filed by the Board and Rhodes should be denied as moot, (3) the motion filed by the Fire Marshal and Smittle for partial summary judgment and their motion for partial dismissal should be denied.

II. Facts

A complete recitation of the facts is not necessary for the resolution of the pending motions. However, the following facts are relevant to the issues raised by the parties. West Virginia Code § 16-5C-1, et seq. and 64 CSR § 65-1, et seq. govern residential board and care homes. Buckhannon operates as a residential board and care home ("RBCH"). The law and regulations require that all RBCH residents possess the ability to remove themselves, physically, from "situations involving imminent danger." 87 CSR § 1-14.7. This ability is called "self-preservation." Id.

On January 4, 1996, Buckhannon applied to OHFLAC for a renewal of their licensure as a RBCH with respect to three homes it operated. On January 30, 1996, OHFLAC conducted an inspection of Buckhannon's facilities and concluded that each home housed residents who were incapable of "self-preservation." As a result, OHFLAC issued statements of deficiency to Buckhannon. On September 3, 1996, OHFLAC conducted a second inspection of the Buckhannon homes and again cited Buckhannon for non-compliance with the fire safety code's requirement that residents of RBCH's be capable of "self-preservation." The State Fire Marshal also inspected the homes and issued a written report in which it reached the same conclusion. On October 18, 1996, OHFLAC ordered Buckhannon to cease operating as a RBCH and to relocate all its residents within 30 days. Subsequently, plaintiffs filed this civil action, alleging that the West Virginia law and the defendants' actions taken pursuant to that law violated the FHAA and the ADA.

III. Motion to Dismiss By HHR, Lewis, OHFLAC, Tyler, Daubman and Caperton -- Granted in part, Denied in part

In assessing a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6), the court must accept the factual allegations contained in the complaint as true. Advanced Health- Care Services, Inc. v. Radford Community Hosp., 910 F.2d 139, 143 (4th Cir. 1990). Dismissal is appropriate pursuant to Rule 12(b)(6) only if "'it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proven in support of its claim.'" Id. at 143-144 (quoting Johnson v. Mueller, 415 F.2d 354, 355 (4th Cir. 1969)).

Stated another way, it has often been said that the purpose of a motion under Rule 12(b)(6) is to test the formal sufficiency of the statement of the claim for relief; it is not a procedure for resolving a contest about the facts or the merits of the case. 5A C. Wright & A. Miller, Federal Practice and Procedure: Civil 2d § 1356, at 294 (1990) (citations omitted). The Rule 12(b)(6) motion also must be distinguished from a motion for summary judgment under Fed. R. Civ. P. 56 which goes to the merits of the claim and is designed to test whether there is a genuine issue of material fact. For purposes of the motion to dismiss, the complaint is construed in the light most favorable to the party making the claim and essentially the court's inquiry is directed to whether the allegations constitute a statement of a claim under Fed. R. Civ. P. 8(a). As many courts have stated, the motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted. Id. § 1357, at 321. As this district court noted in Williams v. Wheeling Steel Corp., 266 F. Supp. 651, 654 (N.D. W. Va. 1967), "[t]he plaintiff's burden in resisting a motion to dismiss for failure to state a cause of action is a relatively slight one."

A. Fair Housing Amendments Act Claim

Under the FHAA, a plaintiff may establish a claim in two ways. First, a plaintiff may allege facial discrimination, i.e. discriminatory intent/disparate treatment. This claim involves alleging that the challenged statute, regulation, or practice subjects, on its face, an FHAA protected group to "explicitly differential" treatment. Bangerter v. Orem City Corp., 46 F.3d 1491, 1501 (10th Cir. 1995). Once a plaintiff has shown such disparate treatment, a prima facie case under the FHAA has been established and the burden shifts to the defendant to justify the discriminatory law, regulation or practice. Larkin v. Michigan Dept. of Social Servs., 89 F.3d 285 (6th Cir. 1996). Second, a plaintiff may allege that an otherwise neutral statute, regulation, or practice has a discriminatory impact upon an FHAA protected group and that the defendant has failed to make a necessary, "reasonable accommodation" to afford the disabled an "equal opportunity to use and enjoy a dwelling." 42 U.S.C § 3604(f)(3)(B); Bryant Woods Inn, Inc. v. Howard Cnty., 124 F.3d 597, 602-03 (4th Cir. 1997); see also Oxford House-C v. St. Louis, 77 F.3d 249 (8th Cir. 1996); Larkin, supra.

This Court has carefully reviewed the plaintiffs' complaint and finds that it establishes a prima facie case under the FHAA for facial discrimination. The relevant West Virginia Code sections and the regulations promulgated thereunder, W. Va. Code § 16-5C-1, et seq. and 64 CSR § 65-1, et seq., apply only to persons residing in convalescent group homes.[1] The purpose behind these laws is stated in W. Va. Code § 16-5C-1. That provision explains that it is the state's purpose to "encourage and promote . . . the effective care and

---

[1] All citations to the West Virginia Code and regulations promulgated thereunder refer to the laws in effect prior to 1997.

treatment of persons who are convalescing or whose physical or mental condition requires them to receive a degree of nursing or related health care greater than that necessary for well individuals, but not so acute as to require hospitalization." This purpose shows that Chapter 16 is not generally applicable; thus, it is not facially neutral. "[S]tatutes that single out for regulation group homes for the handicapped are facially discriminatory." Larkin, 89 F.3d at 290. Moreover, "a plaintiff need not prove the malice or discriminatory animus of a defendant to make out a case of intentional discrimination where the defendant expressly treats someone protected by the FHAA in a different manner than others." Bangerter, 46 F.3d at 1501. It is also clear that Chapter 16 applies to an FHAA protected group. Under the FHAA, a person is "handicapped" if he or she has "a physical or mental impairment which substantially limits one or more of [his or her] major life activities." 42 U.S.C. §3602(h).

As noted above, the defendants have moved this Court pursuant to Rule 12(b)(6) to dismiss plaintiffs' claim under the FHAA. Defendants argue that plaintiffs have failed to state an FHAA claim because the statutes and regulations at issue are rationally related to a legitimate government interest. Specifically, defendants argue that the "self-preservation" requirement ensures the safety of other RBCH residents, staff, and firefighters and that such protection is a legitimate government interest. Further, defendants contend that these laws and regulations are a valid exercise of the State of West Virginia's police powers under the Tenth Amendment of the United States Constitution and this Court should dismiss plaintiffs' claim for that reason.

Applying the standards for granting a motion to dismiss as outlined above, this Court finds that defendants' motion as

to the FHAA claim should be denied. Defendants' arguments are inapposite to a motion to dismiss under the FHAA because they concern justifications for the discriminatory laws and regulations. See Bangerter, 46 F.3d at 1502. Such justifications cannot be found within the four corners of plaintiffs' complaint; therefore, they cannot be considered on a motion to dismiss. Accordingly, this Court concludes that the plaintiffs' pleadings are sufficient to withstand defendants' motion to dismiss the FHAA claim of discriminatory intent. Consequently, defendants motion to dismiss plaintiffs' claim for intentional discrimination under the FHAA should be denied.

Plaintiffs also allege a claim under the FHAA based upon the state's alleged failure to provide a "reasonable accommodation" to the laws and regulations which would allow persons unable to self-preserve to nevertheless live in an RBCH. Plaintiffs urge that a written waiver signed by the residents who cannot respond to an alarm and exit without assistance is a reasonable accommodation. Plaintiffs allege that such waivers were allowed in the past and should continue to be accepted so that those not capable of self-preservation could live in an RBCH if they so choose. Defendants argue that such disregard for the fire regulations is not a reasonable accommodation and contravenes the basic purpose of the regulatory scheme that governs convalescent care. Furthermore, according to defendants, such waivers pose a direct threat to the health and safety of other residents, staff, and firefighters. Finally, defendants argue that plaintiffs cannot maintain both a claim for intentional discrimination and a claim for discriminatory impact, citing Bangerter, 46 F.3d 1491.

In Bangerter, the plaintiff challenged a regulation that applied only to group homes for the handicapped. Plaintiff

argued that the regulation was facially discriminatory and that the state had failed to make a reasonable accommodation for the regulation's discriminatory impact. The court held that the plaintiff had made a prima facie case for intentional discrimination under the FHAA and denied the defendant's motion to dismiss that claim. At the same time, the court dismissed plaintiff's discriminatory impact claim, finding that maintaining both claims under the FHAA was "inappropriate" since plaintiff was not challenging an ordinance that was generally applicable. 46 F.3d at 1502.

This Court agrees with the reasoning of the Bangerter court. It is inconsistent and illogical to find on the one hand that a law or regulation is facially discriminatory because it applies only to the handicapped and then find that it is generally applicable but has a discriminatory impact. As explained above, the West Virginia laws and regulations at issue in this matter apply only to a FHAA protected group. They are facially discriminatory. Plaintiffs cannot simultaneously maintain a claim for intentional discrimination and discriminatory impact plus failure to make a reasonable accommodation. Accordingly, defendants' motion to dismiss plaintiffs' discriminatory impact plus failure to make a reasonable accommodation claim should be granted.

B. Americans with Disabilities Act Claim

The Americans With Disabilities Act states: "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. A "qualified individual with a disability" is one who has a disability, a mental or physical impairment that

substantially limits one or more major life activities, 28 C.F.R. § 35.104, and who

> with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity. 42 U.S.C. § 12131(2); 28 C.F.R. § 35.104.

The ADA does not define "services," "programs," or "activities." "Public entity" is defined, in relevant part, to include "any department, agency, special purpose district, or other instrumentality of a State or States or local government." 42 U.S.C. § 12131(1); 28 C.F.R. § 35.104.

A public entity discriminates against an ADA protected individual if it "administer[s] a licensing or certification program in a manner" that subjects him or her to differential treatment. Also, a public entity may not "establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with disabilities to discrimination on the basis of disability." 28 C.F.R. § 35.130(b)(6). Moreover, a public entity must "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. § 35.130(b)(7).

In support of their motion to dismiss, defendants argue that plaintiffs are not "qualified individuals with a disability" because there is no service, program or activity being offered for which plaintiffs can qualify. (Mot. to Dis. at 14). Further, defendants argue that residence at a RBCH does not constitute such a service, program, or activity by virtue of the state's application of the fire safety code to the homes. (Id. at 14-15). Additionally, defendants contend that while public entities must make reasonable accommodations to ensure equality of opportunity, the ADA must not be interpreted so as to undermine, or require a "fundamental alteration" in, the licensure and fire safety regulation scheme. (Id. at 18-20). According to defendants, plaintiffs' resolution, waivers of liability signed by residents who cannot self-preserve, is not a reasonable accommodation because the waivers would undermine the fire regulation scheme.

Plaintiffs argue in response that the licensing requirements for RBCH's do fall within the scope of the ADA and that a waiver signed by RBCH residents who are not capable of self-preservation constitutes a "reasonable accommodation" that would bring the State and its agencies into compliance with the ADA. Plaintiffs note that such a waiver system has been used previously and that it applies only to one requirement of the fire safety scheme. This prior use of waivers and their negligible effect on the body of regulations governing fire safety show, according to plaintiffs, that waivers do not constitute a fundamental alteration in the licensure and fire safety codes.

After careful review of the parties' motions and memoranda and the relevant case law, this Court finds that plaintiffs have stated a claim under the ADA. As noted above, a Rule 12(b)(6) motion tests only the sufficiency of a

complaint. Unlike a summary judgment motion, a motion to dismiss limits the court's review to the pleadings; the court is not resolving the merits of the case. Applying this standard, this Court finds that defendants' motion to dismiss the ADA claim should be denied. First, no party contests that defendants qualify as public entities. Second, West Virginia Code Sections 16-5C-2(f), 16-5H-2(f) and the regulations thereunder, 64 CSR §§ 65-3, 3.14 and 87 CSR §§ 1-14, 14.7 apply only to RBCH's and impose requirements not imposed on other facilities that house disabled persons. In this way, they subject the residents and the homes to differential treatment. Finally, for the following reasons, this Court finds that the law and the regulations qualify as an "activity" within the scope of the ADA.

Although it appears that no court has addressed whether fire-safety codes are governed by the ADA, some courts have reviewed other types of permitting and licensing schemes. One court has held that the ADA prohibits local governments from administering zoning permit procedures and licensing schemes in a discriminatory manner. Pack v. Clayton County, 1993 WL 837007 (N.D. Ga. 1993) (citing 28 C.F.R. § 35.130(b)(6)). The Second Circuit has held that "activity" includes refusing a building permit to an organization because its clientele were formerly drug-dependant. Innovative Health Sys., Inc. v. White Plains, 117 F.3d 37, 44-45 (2nd Cir. 1997). This Court finds the rationale of the Innovative decision persuasive and applicable to this civil action.

Innovative Health Systems, Inc. ("IHS") was an outpatient drug and alcohol-rehabilitation treatment center which sought permission from the city of White Plains, New York to relocate its facility to downtown White Plains. Because the new facility would be much larger, IHS's director,

Dr. Ross Fishman, planned to expand the services to include treatment for children of chemically-dependent parents. 117 F.3d at 40. Initially, the Deputy Commissioner of Building for the city told IHS that its proposed use of the downtown building was permissible under the city's zoning laws. Id. at 40-41. Dr. Fishman signed a lease for the space and began paying rent. Subsequently, IHS applied for a building permit to renovate the former retail space into office space. Id. at 41. The application generated "tremendous opposition from the surrounding community," who voiced fears of "jeopardized safety and falling property values" and referred to IHS's clientele as "undesirable elements." Id. at 41, 42, n.3. Nevertheless, the Commissioner decided to grant the permit but his decision was subject to the approval of the Zoning Board. The Board reversed his decision and revoked the permit. Id. at 42. As a result, IHS and five of its clients sued the city and others, alleging that the revocation constituted discrimination and differential treatment based solely on a disability which violated the ADA and the Rehabilitation Act. Id.

The city moved to dismiss, arguing, in part, that zoning decisions do not fall within the scope of the ADA. The Second Circuit rejected that argument, finding unpersuasive the rulings of several district courts which held that the ADA did not apply to zoning decisions.[2] In so finding, the court noted that although the ADA did not define "service, program, or activity," the Rehabilitation Act, which contains a similar prohibition of discrimination, defines "program or activity" as

---

[2] See Kessler Inst. for Rehabilitation, Inc. v. Mayor and Council of Essex Falls, 876 F.Supp. 641, 655 (D.N.J. 1995); Robinson v. Friendswood, 890 F.Supp. 616, 620 (S.D.Tex. 1995); Oxford House, Inc. v. Albany, 155 F.R.D. 409, 410-11 (N.D.N.Y. 1994).

"'all of the operations' of specific entities, including 'a department, agency, special purpose district, or other instrumentality of a State or of a local government.'" Id. at 44. (quoting 29 U.S.C. § 794(b)(1)(A) (1994)). The court also recognized, as did the district court, that the plain meaning of "activity" is a "'a natural or normal function or operation.'" Id. (quoting Webster's Third New International Dictionary (1993)). The court concluded that "both the ADA and the Rehabilitation Act clearly encompass zoning decisions by the City because making such decisions is a normal function of a governmental entity." Id. at 44. Additionally, the court found that the legislative history of the ADA shows that Congress intended its prohibitions to apply to all governmental activities of public entities. Id.

Similarly, this Court finds that the ADA encompasses the fire regulation scheme at issue in this civil action because that scheme is a "normal function of a governmental entity." Additionally, although this Court agrees with the Second Circuit's analysis of the ADA's legislative history, this Court finds that resort to that history is neither necessary nor appropriate because the statutory language is unambiguous. See Matala v. Consolidation Coal Co., 647 F.2d 427, 430 (4th Cir. 1981) (explaining "[w]e look to the legislative history in construing a statute only if the meaning of a statute is unclear." United States v. Oregon, 366 U.S. 643, 648 (1961)). Like the Second Circuit, this Court finds that the language of Title II's discrimination provision "prohibits all discrimination by a public entity, regardless of context . . . ." Id. at 44-45. Finally, this Court finds that the rationale of the Innovative decision comports with the plain language of the regulations promulgated under the ADA which clearly state that a public entity may not administer a licensing program in a discriminatory manner. 28 C.F.R. § 35.130(b)(6).

Accordingly, defendants' motion to dismiss plaintiffs' claim under the ADA should be denied.

This Court declines to rule on defendants' argument that a waiver does not constitute a reasonable modification to the fire regulation scheme for the same reasons that this Court declined to rule on the issue with respect to plaintiffs' FHAA claims. Such arguments test the merits of the complaint as opposed to its sufficiency and are properly considered on a motion pursuant to Rule 56.

C. Capacity and Ripeness Defects

Defendants assert that neither the next friends nor the Association possess the capacity to sue on behalf of the named residents, Daisy Layman and Dorsey Pierce. Defendants argue that before the next friends may bring suit on behalf of the residents, the residents must be adjudicated incompetent by a West Virginia state court. Defendants assert that the lack of a guardian for either resident shows that neither one has been adjudicated incompetent because West Virginia Code § 44A-2-1 would require such an appointment. Defendants base this argument upon Fed. R. Civ. P. 17(b) & (c).

In response, plaintiffs argue that "there is no dispute" that Ms. Pierce is incompetent as a result of her dementia; thus, it is "prudent" for her to sue through a next friend. (Resp. Br. at 22). Plaintiffs also explain that Ms. Layman sues through a next friend because of her inability to attend court proceedings, but that she would be willing to proceed in her own name. Further, plaintiffs argue that this Court possesses the power, without regard to state law, to appoint guardians for these individuals pursuant to Fed. R. Civ. P. 17(c) because it is a procedural rule and not a substantive rule.

This Court agrees with defendants. "The district court's power to appoint under Rule 17(c) should not be used to circumvent the mandate in Rule 17(b) to observe state law." Wolfe by Hedges v. Bias, 601 F. Supp. 426, 427-28 (S.D. W. Va. 1984) (citing 6 C. Wright & A. Miller, Federal Practice and Procedure, § 1571 (1971)). West Virginia law provides for the appointment of guardians and/or conservators for the incompetent. W. Va. Code § 44A-1-1, et seq. (1994). As the court in Wolf, supra, noted, that process includes an evidentiary hearing, the appointment of counsel for the alleged incompetent, and now it requires an evaluation report by a licensed physician or psychologist.[3] Like the Wolf court, this Court will not circumvent that process. At the same time, this Court finds it inappropriate to dismiss this action on this ground because the impropriety of suing by next of friend does not affect the elements of the claims alleged in the complaint. Accordingly, this Curt finds that defendants' motion to dismiss for lack of capacity should be denied. Additionally, this Court finds it appropriate to direct plaintiffs to substitute the real parties in interest in lieu of the inappropriately named next friends.

D. Lack of Standing

Defendants also assert that the next friends and the association lack standing to seek relief that would adversely impact other residents in Buckhannon facilities. Defendants

---

[3] At the time of the Wolf decision, the appointment of guardians for the incompetent was governed by West Virginia Code § 27-11-1, et seq, which the court notes required "at least a supportive affidavit by a duly licensed physician" in addition to the evidentiary hearing and appointment of counsel. 601 F. Supp. at 428.

argue that the waivers sought by plaintiffs operate to nullify the fire safety scheme; thus, as plaintiffs seek relief for all Buckhannon facilities in the form of waivers, they are pursuing a judgment that endangers those residents who are not before the Court and who are protected by the fire regulations. Defendants cite no law in support of this position. Plaintiffs did not address this argument in their response.

This Court has already addressed the next friends' capacity to sue. With respect to the Association, this Court finds that defendants' argument lacks merit. In Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343 (1977), the Supreme Court set forth the requirements of associational standing. An association may seek prospective judicial relief on behalf of its members when (1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claims asserted, nor the relief requested, requires the participation of the individual members in the lawsuit.

Here, the residents would have standing to sue in their own right. To show standing under Article III, the residents must establish: (1) they suffered actual or threatened injury, (2) the conditioned complained of caused the injury or threatened injury and (3) the requested relief redressed the alleged injury. See e.g. Finlator v. Powers, 902 F.2d 1158 (4th Cir. 1990). The residents' non-ambulatory status prevents them from remaining at a RBCH; the current fire regulations are the cause of this injury; and the requested relief, a waiver, would redress this injury because it would allow them to remain at their RBCH. Thus, the first requirement for associational standing has been met. The purpose of a RBCH is to house people who can no longer care for themselves; hence, the Association seeks

protection of its interest in extending care to such people regardless of their ambulatory status and in doing so satisfies the second criteria for associational standing. Finally, the participation of the individual residents is not required because neither the ADA nor the FHAA claims require individualized proof. For the foregoing reasons, this Court finds that the Association has standing to sue the defendants. Accordingly, defendants' motion to dismiss for lack of standing should be denied.

E. Exhaustion of Administrative Remedies

At the time defendants filed this motion, the matter was pending before an administrative law judge with a hearing scheduled for November 15, 1996. Defendants argued, based on this fact, that plaintiffs had not exhausted their administrative remedies and that this action should be dismissed for that reason. In response, plaintiffs asserted that the FHAA permits instituting a civil action in the district court without exhaustion of administrative remedies.

On February 11, 1998, this Court asked counsel in this action to advise it of the status of that proceeding. Counsel informed this Court that the administrative law judge has rendered an opinion, that plaintiffs have appealed the decision to the appropriate circuit court in West Virginia and that the action has been stayed, by mutual agreement, pending this Court's resolution of plaintiffs' claims. Accordingly, this Court finds that defendants' motion to dismiss for failure to exhaust administrative remedies should be denied.

IV. Motion For Summary Judgment in Part and to Dismiss in Part by West Virginia State Board of Examiners for Registered Nurses and Rhodes -- Denied as Moot

On November 20, 1996, the Board and Rhodes filed a motion for summary judgment in part and a motion to dismiss in part. On December 12, 1997, the parties stipulated to the dismissal of both the West Virginia State Board of Examiners for Registered Nurses and Laura S. Rhodes, Executive Director. Accordingly, the above-mentioned motions should be denied as moot.

V. Renewed Motion for Summary Judgment in Part and Motion to Dismiss in Part by West Virginia Office of State Fire Marshal and Smittle -- Denied

On January 13, 1997, the Fire Marshal and Smittle filed a "renewed" motion for summary judgment and a motion to dismiss. After reviewing that document, this Court finds that the motions should be denied for the following reasons. First, the motion for summary judgment appears, as far as this Court can discern, to be made by incorporation of the Board and Rhodes' motion for summary judgment. With respect to the Fire Marshal and Smittle, this Court cannot determine by the motion the extent to which the Board's motion applies to these defendants, and these defendants have not argued with any particularity. Moreover, these defendants have not complied with the local rule governing summary judgment motions, LR 7.2, which requires a supporting memorandum and other documents upon which the Rule 56 motion relies. For these reasons, the motion for summary judgment should be denied.

These defendants move to dismiss the amended complaint with respect to themselves on the ground that plaintiffs have "failed to allege any adverse action taken by Defendant Fire Marshal." (Renewed Mot. at 2). Additionally, these defendants state that plaintiffs have not sought any modification of the fire code nor have plaintiffs exhausted their

administrative remedies. This Court has addressed exhaustion of remedies. As to these defendants' other assertions, this Court finds that plaintiffs' complaint, to the extent that it seeks injunctive relief from enforcement of the fire code, asserts claims against the Fire Marshal and Smittle that are sufficient to survive a Rule 12(b)(6) motion. Accordingly, defendants Fire Marshal and Smittle's renewed motion to dismiss should be denied.

These defendants also move to dismiss (or for summary judgment) plaintiffs' claims made pursuant to Title III of the ADA. They make this motion by incorporating a memorandum defendants state was entitled "A Memorandum of Law in Support of Defendant's [sic] West Virginia State Board of Examiners for Registered Professional Nurses, Laura S. Rhodes, Executive Secretary, Renewed Motion for Summary Judgment in part and Motion to Dismiss in Part in Response to Plaintiffs' Amended Complaint." Such a document was never filed with this Court. Because these arguments are not before this Court, defendants' motion to dismiss plaintiffs' Title III ADA claims should be denied.

VI. Conclusion

First, because this Court finds that plaintiffs have stated a claim for facial discrimination under the FHAA and for discrimination under the ADA, defendants' motion to dismiss for failure to sufficiently allege these claims is DENIED. Second, because this Court finds that plaintiffs cannot consistently maintain a claim for facial discrimination and discriminatory impact, defendants' motion to dismiss the discriminatory impact claim is GRANTED. Third, defendants' motion to dismiss for lack of capacity to sue is DENIED and plaintiffs are **DIRECTED to substitute the real parties in**

interest in lieu of the inappropriately named next friends within ten (10) days following the entry of this order. Fourth, because this Court finds that the West Virginia Residential Board and Care Home Association has associational standing, defendants' motion to dismiss for lack of standing is DENIED. Next, because this Court finds no reason to dismiss for failure to exhaust administrative remedies, defendants' motion to dismiss on that ground is DENIED.

Additionally, because the Board and Laura S. Rhodes are no longer defendants in this action, their motion for summary judgment in part and to dismiss in part are DENIED as MOOT. Finally, the motions to dismiss and for summary judgment made by the Fire Marshal and Walter Smittle are DENIED for the reasons set forth above.

IT IS SO ORDERED.

The Clerk is directed to transmit copies of this order to counsel of record herein.

ENTERED: February 18, 1998

s/ Frederick P. Stamp, Jr.
FREDERICK P. STAMP, JR.
UNITED STATES DISTRICT JUDGE

[This Exhibit was attached to Defendants' Motion to Stay, which is Omitted]

Senate Bill No. 627

ARTICLE 5H. RESIDENTIAL BOARD AND CARE HOMES

§16-5H-1. Purpose.

It is the policy of this state to encourage and promote the development and utilization of resources to ensure the effective care and treatment of persons who are dependent upon the services of others by reason of physical or mental impairment or who may require limited and intermittent nursing care, ~~but who are capable of self-preservation and are not bedfast~~, including those individuals who qualify for and are receiving services coordinated by a licensed hospice. Such care and treatment requires a living environment for such persons which, to the extent practicable, will approximate a normal home environment. To this end, the guiding principle for administration of the laws of the state is that such persons shall be encouraged and assisted in securing necessary care and treatment in noninstitutional surroundings. In recognition that for many such persons effective care and treatment can only be secured from proprietary and voluntary residential board and care homes, it is the policy of this state to encourage, promote and require the maintenance of residential board and care homes so as to ensure protection of the rights and dignity of those using the services of such residential board and care homes.

The provisions of this article are hereby declared to be remedial and shall be liberally construed to effectuate its purposes and intents.

§16-5H-2. Definitions.

(j) "Residential board and care home" means any residence or place or any part or unit thereof, however, named, in this state which is advertised, offered, maintained or operated by the ownership or management, whether for a consideration or not, for the express or implied purpose of providing accommodations, personal assistance and supervision, for a period of more than twenty-four hours, to four or more persons who are dependent upon the services of others by reason of physical or mental impairment or who may require limited and intermittent nursing care, ~~but who are capable of self-preservation, as certified in consultation with a licensed health care professional, and are not bedfast~~ including those individuals who qualify for and are receiving services coordinated by a licensed hospice: *Provided*, That services utilizing equipment which requires auxiliary electrical power in the event of a power failure may not be used unless the residential board and care home has a backup power generator: *Provided*, however, That the care or treatment in a household, whether for compensation or not, of any person related by blood or marriage, within the degree of consanguinity of second cousin to the head of the household, or his or her spouse, may not be deemed to constitute a residential board and care home within the meaning of this article. Nothing contained in this article applies to hospitals, as defined under section one, article five-b of this chapter; or state institutions, as defined under section three, article one, chapter twenty-five of this code or section six, article one, chapter twenty-seven of this code; or residential board and care homes operated by the federal

government or the state government or institutions operated for the treatment and care of alcoholic patients; or offices of physicians; or hotels, boarding homes or other similar places that furnish to their guests only room and board; or to homes or asylums operated by fraternal orders pursuant to article three, chapter thirty-five of this code;

~~(l) "Self-preservation" means that a person is, at least, capable of removing his or her physical self from situations involving imminent danger, such as fire; and~~

[Case Style Omitted]

MOTION TO DISMISS

Comes now Walter Smittle State Fire Marshal by counsel and moves this Court to Dismiss the above-styled action for the following reasons:

1. The above-styled civil action has been rendered moot by action of the West Virginia Legislature who amended the relevant fire code and statutory provisions.

2. Dismissal is appropriate when the controversy presented for review has become moot. Karder v. May, 484 U.S. 72, 82, 83, 109 S. Ct. 388, 98 L. Ed. 2d 327 (1987).

WHEREFORE, for the above reasons and those contained in the attached Memorandum of Law, defendant Smittle now does humbly pray that he be DISMISSED from the above-styled civil action.

Respectfully Submitted,

WEST VIRGINIA OFFICE OF THE STATE FIRE MARSHAL, WALTER SMITTLE,
Fire Marshal,
By Counsel

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

s/ Chad M. Cardinal
CHAD M. CARDINAL (Bar # 6016)
ASSISTANT ATTORNEY GENERAL
State Capitol, Room E-26
Charleston, West Virginia 25305

[Case Style Omitted]

PLAINTIFFS' MOTION FOR ATTORNEYS' FEES

Come now Plaintiffs and move this Court, pursuant to Rule 54(d)(2) of the Federal Rules of Civil Procedure, for attorneys' fees. In support of such motion, Plaintiffs respectfully state as follows:

1. Both the Fair Housing Amendments Act of 1988 ("FHAA"), 42 U.S.C. 3601, et seq. and the Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 1233, provide that a court has the discretion to grant a prevailing party a reasonable attorney's fee, including expert fees, as part of the costs of litigation.

2. As discussed in detail in the supporting affidavit filed by Webster J. Arceneaux, III and the Memorandum of

Law in Support of Plaintiffs' Motion for Attorneys' Fees, Plaintiffs are prevailing parties in the instant matter, and as such are entitled to attorneys fees and costs under the FHAA and the ADA against all of the Defendants in the amount of $ 120,744.65.

3. Alternatively, the District Court also has inherent authority to award attorneys fees to a party when an opposing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons.

4. As Plaintiffs fully have explained in the supporting affidavit of Webster J. Arceneaux, III and the Memorandum of Law in Support of Plaintiffs' Motion for Attorneys' Fees, Defendants State Fire Marshal and State Fire Commission have acted in bad faith as well as vexatiously in the litigation of the instant matter. Accordingly, Plaintiffs are alternatively entitled to an award of attorneys' fees and expenses from March 11, 1997 to the present against the Defendants State Fire Marshal and State Fire Commission in the amount of $57,483.76.

WHEREFORE, Plaintiffs respectfully request that, the Court grant Plaintiffs' Motion for Attorneys' Fees on the basis that the Plaintiffs are prevailing parties in the instant matter against all Defendants in the amount of $120, 744.65. In the alternative, Plaintiffs request that the Court sanction Defendants State Fire Marshal and State Fire Commission for their bad faith conduct in the course of this litigation by requiring said Defendants to pay Plaintiffs' attorneys' fees from March 11, 1997 to the present in the amount of $ 57,483.76.

BUCKHANNON BOARD AND CARE HOME, INC; ALMOST HOME, INC. THE WEST VIRGINIA RESIDENTIAL BOARD

AND CARE HOME ASSOCIATION; DAISY LAYMAN, by her next friend, FAYE BYERS; DORSEY PIERCE, by her next friend LOCKIE J. MARPLE, and on behalf of all others similarly situated,

By Counsel,

LEWIS, FRIEDBERG, GLASSER, CASEY & ROLLINS, LLP

s/ Webster J. Arceneaux, III
Webster J. Arceneaux, III (State Bar I.D. # 155)
Sandra K. Henson (State Bar I.D. # 6329)
Post Office Box 1746
Charleston, West Virginia 25326
(304) 345-2000

[Certificate of Service and Exhibits Omitted]

[Case Style Omitted]

WEBSTER J. ARCENEAUX, III'S AFFIDAVIT IN SUPPORT OF MOTION FOR ATTORNEYS FEES AND EXPENSES

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, To-wit:

I, Webster J. Arceneaux, III, being first duly sworn upon my oath, hereby come forth and state as follows:

1. I received my Doctor of Jurisprudence degree from the West Virginia University College of Law in 1980. I became a member of the West Virginia Bar in that year.

2. I am also a member of the U. S. District Courts for the Northern and Southern Districts of West Virginia and have been admitted to practice before the Fourth and Sixth Courts of Appeals.

3. Between 1980 and the present, the undersigned has held the following positions:

1980-1981	Law Clerk to Justice Thomas B. Miller
1981-1982	Associate, Kaufman & Ratliff
1982-1985	Counsel and then General Counsel, District 17, United Mine Workers of America
1985-1986	Deputy Attorney General, Environment and Energy Division
1986-1990	Associate, McIntyre Haviland & Jordan
1990-	Associate and then, as of 1993, Partner, Lewis, Friedberg, Glasser, Casey & Rollins

4. Through eighteen years of legal practice, the undersigned has developed substantial experience in federal court litigation related to constitutional and discrimination matters, including claims under the ADA.

5. I have previously been awarded attorneys fees in a variety of cases before the West Virginia Supreme Court, the Circuit Courts of West Virginia, and the West Virginia Human Rights Commission. In WVEA v. The Consolidated Public Retirement Board, Civil Action No. 89-Misc-18, Judge

A. Andrew MacQueen awarded my client WVEA attorneys fees for my legal work in the amount of $180.00 per hour in 1996. The attorneys fees award was subsequently vacated by agreement of the parties upon an agreement by the State to settle the matter and pay the attorneys fees in full at the rate of $180.00 an hour. A hearing examiner for the West Virginia Human Rights Commission also awarded me this year an attorneys fee award at the hourly rate of $180.00 in Deitz v. WV Department of Public Safety, Docket Number: ES-149-93A. That case is presently on appeal to the Human Rights Commission.

6. Attached hereto is an itemized list of the time myself and my associates and paralegals spent on this matter and an itemization of the expenses incurred.

7. I believe the hourly rates for myself, for my associates and for my paralegals is well within the range of what other counsel have been awarded in the state of West Virginia for similar legal services and is therefore a fair and reasonable rate for the litigation of this case.

8. In preparing this affidavit, I reviewed this firm's time entries, and I deleted from the bill all time related to the dismissed claim against the WV Board of Nursing Examiners; all time related to the State appeal of the OHFLAC administrative hearings; and, all time that appeared to be improperly on the bill. The original bills and the modifications are attached hereto.

9. On February 27, 1997, I received a copy of the District Court of the Northern District of Georgia's recent opinion in Baggett, et al. v. Baird, et al., 1997 WL 151544 (N.D. Ga. 1997).

10. On March 11, 1997, I provided a copy of said opinion to Richard Yurko who had recently been designated as counsel for the majority of the Defendants including OHFLAC and the State Fire Marshal. At that time, I asked Mr. Yurko if he thought the Defendants would be interested in settling and he was advised that the State Fire Marshal was definitely unwilling to settle this matter and that it would have to be resolved by the Courts. Thereafter, the parties never discussed settlement again.

11. I did not learn of the legislative activity related to the amendments to the State Fire Code until February 24, 1998, after completing the briefs accompanying their summary judgment motion and receipt of the Court's ruling on the Motion To Dismiss. It is significant to note that I only learned of this legislative activity after one of my clients was tipped off by an agent of the State Fire Marshal's office. I was shocked by this development and I called Richard Yurko, counsel for the Defendants, on February 24, 1998, who likewise was surprised to learn that the State Fire Marshal had promulgated amendments to the State Fire Code which were before the Legislature.

12. Mr. Yurko later called me to confirm the State Fire Code amendments and to advise that OHFLAC likewise had introduced a bill to amend W. Va. Code § 16-5H-2(j) by removing the term self-preservation.

13. Had Defendants State Fire Marshal and State Fire Commission informed me of their willingness or intent to amend the Fire Code and to eliminate the self-preservation regulations on the date of the Smittle deposition, March 11, 1997, the instant matter could have been stayed or may have

been resolved without my having to incur significant time and expenses between March 11, 1997, and the present.

s/Webster J. Arceneaux, III
Webster J. Arceneaux, III
(State Bar ID No. 155)
LEWIS, FRIEDBERG, GLASSER, CASEY & ROLLINS, LLP
Post Office Box 1746
Charleston, West Virginia 25326

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA

Signed and sworn before me this 4th day of June, 1998, by Webster J. Arceneaux, III.

My commission expires November 19, 2004

s/ Geraldine S. Strickland
Notary Public

[Exhibits Omitted]

[Case Style Omitted]

RESPONSE TO MOTION FOR ATTORNEY FEES

Comes now Walter Smittle State Fire Marshal, by and through counsel, Chad M. Cardinal, Assistant Attorney General to reply to Motion for Attorney Fees as follows:

I.
BACKGROUND

The above-styled action has been rendered moot. Not by any action of Plaintiff's counsel, nor through any influence of the Court, but rather by the political law making processes.

The State Fire Code was amended by the State Fire Commissioner after several open public meetings, all of which were advertised in the State Register and following the receipt of written comments. The Fire Code then progressed to the State Legislature's Rule making Committee, and again was the topic of public debate and subject to the Committees' vote. The Rule then became part of a bill and progressed to the full House and Senate for vote, and then to the Governor for signature.

There is nothing in the record to indicate, nor is it alleged that this political process was corrupted by Plaintiffs. Nothing indicates that the motivations of the Senators, Representatives, Committee members, Fire Commissioners, Fire Marshal, nor the Governor was in anyway influenced by pending litigation. In fact, it is unclear that any of the voting parties even knew of the existence of an unresolved lawsuit, which at that time was being defended by insurance counsel.[1]

II.
ARGUMENT

---

[1]The Board of Risk Management did not perceive the case as against the State herself, but rather against the insurance policy. It was only after the case was rendered moot by legislative action that Plaintiff stipulated they no longer sought compensatory damages.

a. Plaintiff is not a "Prevailing Party" for the purposes of an award of attorney fees.

The question for review is whether Plaintiffs are entitled to attorney fees as a prevailing party.

In Farrar v. Hobby, 506 U.S. 103, 113 S. Ct. 566, 121 L. Ed. 2d 494 (1992), the Supreme Court provided the applicable standard:

> [T]o qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim. The plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought, or comparable relief through a consent decree or settlement. Whatever relief the plaintiff secures must directly benefit him at the time of the judgment or settlement. Otherwise the judgment or settlement cannot be said to "affec[t] the behavior of the defendant toward the plaintiff."

Farrar, at 111, 113 S. Ct. at 573 (internal citations omitted), The United States Court of Appeals for the Fourth Circuit interpreted Farrar's requirement in S-1 By and Through P-1 v. State Bd. of Educ. of North Carolina, 6 F.3d 160 (4th Cir. 1993)(Wilkinson, J., dissenting), vacated, 21 F.3d 49, 51 (4th Cir.) (en banc)(adopting Judge Wilkinson's dissent as the majority opinion), cert. denied, 513 U.S. 876, 115 S. Ct. 205, 130 L.Ed.2d 135 (1994). There the "catalyst theory" was specifically rejected and cases such as Bonnes v. Long, 599

F.2d 1316 (4th Cir. 1979), which applied that standard were overruled.

The Court clearly articulated the determinative factors:

> [1] 1. A person may not be a "prevailing party" plaintiff under 42 U.S.C. Sec. 1988 except by virtue of having obtained an enforceable judgment, consent decree, or settlement giving some of the legal relief sought in a Sec. 1983 action. Farrar v. Hobby, 506 U.S. 103, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992).
>
> [2] 2. The fact that a lawsuit may operate as a catalyst for post-litigation changes in a defendant's conduct cannot suffice to establish plaintiff as a prevailing party. "catalyst theory," allowing that result, is no longer available for that purpose, see Farrar, 506 U.S. at 103, 113 S.Ct. at 573-74, and cases such as Bonnes v. Long, 599 F.2d 1316 (4th Cir. 1979), which applied that theory, are overruled. S-1 and S-2, 21 F.3d at 51.

The Court concluded that the determinative factor is whether "material alteration of the legal relationship between the parties" as manifested by whether the plaintiff was entitled to enforce 'a judgment, consent degree, or settlement against the defendant S-1 By and Through P-1, 6 F.3d at 168-69 (Quoting Farrar, 506 U.S. at 113, 113 S.Ct. at 574).; Statewide Reapportionment Advisory Committee v. Beasley, 99 F.3d 134 (4th Cir. 1996) cert. denied, ___ U.S. ___, 117 S. Ct. 1427, 137 L. Ed.2d 536 (1997). Applying the holdings of S-1, S-2, Farrar,

and Statewide to the matter at hand, Plaintiffs do not meet the definition of "Prevailing Party."

The above matter was rendered moot by a change in legislation. The current litigation in no way altered the relationship of the parties, nor did it provide any form of enforceable decree. The claim simply vanished due to actions of the Political Process.[2] As such, Plaintiff is not a "Prevailing Party" and not entitled to an award of attorney fees.

III.

b. Plaintiff fails to establish a claim for Attorney Fees or sanctions based upon bad faith.

Plaintiff's counsel admits that the proposed changes to the Fire Code were the result of a series of open meetings, of the Fire Commission and State Legislature. All were noticed in the State Register. (Exhibit No. 1.) The proposed changes and meetings were advertised in every state newspaper, television and radio station. (Exhibit No. 2.) Nothing was secret. Plaintiff counsel had constructive knowledge of the proposed changes. The Fire Commission & Fire Marshal proposed the changes in a public way, as required by law. West Virginia Code § 29A-1-1 et seq. There is nothing more legally or morally required.

Plaintiff's counsel relies on Square Construction Co. v. Washington Metropolitan Area Transit Authority, 800 F.2d 1256 (4th Cir. 1986) to support the proposition that the

[2]It is note worthy that Plaintiffs did not file any written comments on the proposed code changes, nor did they attend any Fire Commission meetings.

deliberate withholding of relevant documents can give rise to sanctions. That fact pattern is easily distinguishable from the matter at hand. At bar, the proposed legislation was in the thoroughly public rule making process. Not only was Plaintiff's counsel provided the same notice as every other citizen of this State, but he also shared their opportunity to provide written comments, and attend the open meetings. W. Va. Code § 29A-1-1 et seq.

Though it is true that Plaintiff's counsel was not specifically invited, (such solicitation of input from a particular interest group is problematic, see State ex rel. White v. Parsons, 483 S.E.2d 1, (WV 1996), he was afforded opportunities far different and greater than in those cases where documents are concealed for nefarious purposes. There simply is not factual underpinning to support the claim.

It is far to tenuous to sanction Defendants' claims, for it was Plaintiffs' attorney who failed to stay informed of current events. No claim of fraud, deceit, or bad faith can survive the simple fact that Plaintiffs had constructive knowledge of Defendants action. Plaintiff makes it clear that Defendants' then counsel, Richard Yorko, did nothing wrong.[3] Defendants, Fire Marshal, and Fire Commissioner obviously never considered their actions in amending the Fire Code as part of the pending litigation, so much so, that they never even discussed the new legislation with defense counsel.

Finally it is interesting to note that when Defendants' counsel became cognitive of the proposed Fire Code changes, Defendants moved to stay the proceedings. Plaintiffs opposed

[3]At worst there was a lack of communication between the Fire Marshal and counsel.

that motion. It is not clear that had Plaintiff's counsel read the State Register, or attended the advertised Fire Commission meetings, he would have proceeded any differently. Plaintiff has failed to establish Defendants acted in bad faith, or attempted in any way to unnecessarily prolong the litigation. Sanctions against the State are obviously not warranted.

CONCLUSION

Plaintiff is not entitled to an award of Attorney Fees, for the 4th Circuit rejects the "catalyst theory," and no enforceable settlement, judgment, or consent decree evolved from this litigation. Finally, the Attorney cannot reasonably assert bad-faith by the State when nothing was concealed, all was made public in such a way that Plaintiffs could have actually participated in a meaningful way, had they elected to do so.

WHEREFORE, Defendant now does humbly pray that this Court deny Plaintiff's claim of attorney fees and sanctions.

Respectfully Submitted,
West Virginia State Fire Marshal,
Walter Smittle, Fire Marshal,
Defendant,
By counsel,

DARRELL V. McGRAW, JR.
ATTORNEY GENERAL

s/ Chad M. Cardinal
CHAD M. CARDINAL (Bar # 6016)
ASSISTANT ATTORNEY GENERAL
State Capitol, Room E-26
Charleston, West Virginia 25305

[Certificate of Service Omitted]

[Case Style Omitted]

DEFENDANT, DEPARTMENT OF HEALTH AND HUMAN RESOURCES RESPONSE TO PLAINTIFF'S MOTION FOR ATTORNEY FEES

PLAINTIFFS ARE NOT PREVAILING PARTES IN THIS MATTER AND ARE NOT ENTITLED TO ATTORNEY FEES.

The essential issue presented by plaintiff's Motion for Attorney Fees is whether following dismissal of an action under 42 U.S.C. §§3601 *et seq.* and 42 U.S.C. §§ 12132 and 12182 as moot, the plaintiffs may still be found to be prevailing parties by virtue of pre-judgment events and therefore entitled to an award of attorney fees. The defendants think not.

The plaintiffs acknowledge early on in their Memorandum in Support of their Motion for Attorneys Fees argument that the Fourth Circuit Court of Appeals, in S-1 and S-2 v. State Board of Education of North Carolina, 21 F3d 49 (4th Cir.), cert. denied, 115 S.Ct. 205 (1994) and Statewide Reapportionment Advisory Committee v. Beasley, 99 F.3d 134 (4th Cir. 1996), has declared that the catalyst theory is no longer available to litigants in fee shifting cases. Yet they would have this Court set aside those holdings *sua sponte* and ignore the rule of *stare decisis*. Defendants respectfully submit that this district court does not have discretion to disregard the controlling precedent of the Fourth Circuit Court of Appeals,

and any argument for reconsideration of such Court of Appeals decision is for Court of Appeals. Smith v. Allen-Bradley Co., et al., 371 F.Supp. 698 at 701 (W.D.Va. 1974).

In S-1 and S-2, *supra*, the United States Court of Appeals, Fourth Circuit has adopted the dissenting opinion of Judge Wilkinson from its previous S-1 and S-2 case, 6 F.3d 160 (1993), and has ruled that "a person may not be a "prevailing party" plaintiff under § 1988 except by virtue of having obtained enforceable judgment, consent decree, or settlement giving some of the legal relief sought in the § 1983 action, citing Farrar v. Hobby, 506 U.S.103, 113 S.Ct. 566 (1992)." The Fourth Circuit also ruled that "The fact that a lawsuit may operate as a catalyst for post-litigation changes in a defendant's conduct cannot suffice to establish plaintiff as a prevailing party. "Catalyst theory," allowing that result, is no longer available for that purpose, see Farrar, 506 U.S. at —, 113 S.Ct. at 573-74, and cases such as Bonnes v. Long, 599 F.2d 1316 (4th Cir. 1979), which applied that theory, are overruled." Id. at p. 51. Defendants submit that there has been no enforceable judgement or comparable relief through a consent decree or settlement which would qualify plaintiffs as a prevailing party. Farrar v. Hobby, 113 S.Ct. 566 at 573 (1992). Whatever relief the plaintiff secures must directly benefit him at the time of the judgment or settlement. Otherwise the judgment or settlement cannot be said to "affect] the behavior of the defendant toward the plaintiff." Id. at 11, 113 S.Ct. at 573 (internal citations omitted). Defendants further submit that plaintiffs were not the catalyst for amendments to the W.Va. Code relative to self-preservation, but rather, they had been considering the deletion of the self-preservation requirement prior to the initiation of this lawsuit. And, if this case is mooted, how can it still be a catalyst for change and for the recovery of attorney's fees?

In Texas State Teachers Ass'n v. Garland Indep. Sch. Dist., 489 U.S. 782, 793-93, 109 S.Ct. 1486, 1493 (1989), the U.S. Supreme Court has stated that "the lawsuit must materially alter the "legal relationship" between plaintiffs and defendants". Farrar, *supra* clearly states that "[n]o material alteration of the legal relationship between the parties occurs until the plaintiff becomes entitled to enforce a judgment, consent decree, or settlement against the defendant." Id. 506 U.S. at ----, 113 S.Ct. at 574. Further, Farrar clarifies the Court ruling in Hewitt v. Helms, 482 U.S. 755, 107 S.Ct. 2672 (1987), in which the Court stressed that a voluntary change in conduct must be formalized in a legally enforceable settlement agreement to transform a plaintiff into a prevailing party for purposes of a § 1983 action. The Department of Health and Human Resources has caused the deletion of self-preservation from its statute. It is argued that because of the deletion of statutory authority to enforce the self-preservation requirement, the Department lacks authority to enforce the regulation which still remains. It is further argued that the Department should not be penalized for making voluntary changes in its statute, and its voluntary change in conduct should not be "a license to shake down government officials," or "a relief Act for lawyers." Farrar, 506 U.S. at —, 113 S.Ct. at 578.

Defendants submit that the Farrar, Texas State Teachers' Ass'n, and Hewitt, and S-1 and S-2, *supra*, decisions also apply to determinations of prevailing party status under 42 U.S.C. §§ 12205 and 3612, and based on that caselaw, plaintiffs are not prevailing parties in this action and are not entitled to attorneys' fees from defendant, Department of Health and Human Resources.

Respectfully submitted,

WEST VIRGINIA DEPARTMENT OF
HEALTH AND HUMAN RESOURCES,

Defendants,
By Counsel,

DARRELL V. MCGRAW JR.
ATTORNEY GENERAL

s/ Charlene A. Vaughan
CHARLENE A. VAUGHAN
DEPUTY ATTORNEY GENERAL
DEPARTMENT OF HEALTH
and HUMAN RESOURCES
State Capitol Complex
Building 3, Room 210
Charleston, WV 25305
Bar ID 3855
(304) 558-2131
[Certificate of Service Omitted]

[Case Style Abbreviated]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

BUCKHANNON BOARD AND CARE
HOME, INC., et al.

Plaintiffs,

v. Civil Action No. 2:96CV106
(STAMP)

WEST VIRGINIA DEPARTMENT OF
HEALTH AND HUMAN RESOURCES, et al.

MEMORANDUM OPINION AND ORDER GRANTING MOTION FOR RULE 11 SANCTIONS AND IMPOSING SANCTIONS

I. Introduction

This civil action arose, in part, out of plaintiffs' allegations that defendants violated the Americans with Disabilities Act ("ADA") and the Fair Housing Amendments Act ("FHAA"). In the original complaint, plaintiffs sought declaratory and injunctive relief in addition to money damages. Subsequently, plaintiffs relinquished their claims for compensatory damages and pursued only equitable relief. At the time plaintiffs filed the complaint, West Virginia Code § 16-5C-1, et seq. and 64 CSR § 65-1, et. seq. required that all Residential Board and Care Home ("RBCH") residents be capable of "self-preservation," which meant that each resident be able to remove, physically, himself or herself from "situations involving imminent danger." 87 CSR § 1-14-7. Plaintiffs sought a declaration from this Court that the "self-preservation" requirement violated the ADA and the FHAA.

On March 14, 1998, the West Virginia Legislature enacted Senate Bill No. 627 which amended the West Virginia Code by deleting the "self-preservation" requirement. On January 29, 1999, this Court entered a Memorandum Opinion and Order dismissing this civil action, finding that the amendment mooted plaintiffs' claims. At the same time, this Court issued an order to defendants Walter Smittle, the West Virginia Office of the State Fire Marshal, and the West Virginia State Fire Commission ("defendants") to show cause as to why they were not in violation of Federal Rule of Civil Procedure 11, after this Court learned that they were aware of the amendment process that resulted in the deletion of the "self-

preservation" requirement, aware that the proposed amendment was progressing successfully at several stages which took place during the pendency of this litigation but failed to inform plaintiffs, this Court, and even their own counsel of the proposed change. In its order to show cause, in accordance with Fed. R. Civ. P. 11(c)(1)(B), this Court described the conduct it found to be a potential violation of the rule and gave defendants an opportunity to respond.

On February 17, 1999, defendants filed a memorandum in response to the order to show cause. On February 23, 1999, plaintiffs filed a motion for sanctions pursuant to Rule 11 and a memorandum in support of the motion and in response to defendants' show cause memorandum.[1]

For the reasons set forth below, this Court finds that plaintiffs' motion for Rule 11 sanctions should be granted and that defendants should be sanctioned for their failure to disclose the amendment they were seeking in light of their knowledge that the proposed amendment was being approved at several stages of the process by which it was ultimately enacted as a part of Senate Bill No. 627.

II. Discussion

---

[1] In the January 29, 1999 Order, this Court denied a motion for attorneys' fees previously filed by plaintiffs. The motion was made pursuant to Fed. R. Civ. P. 54(d)(2) and was premised on two theories: that plaintiffs were prevailing parties under the FHAA, 42 U.S.C. § 3601, et seq., and the ADA, 42 U.S.C. § 1233 et seq. or that the bad faith doctrine entitled plaintiffs to an award of fees. This Court denied the motion finding that defendants' conduct did not rise, or sink, to the level of bad faith, vexatious, wanton or oppressive conduct.

Rule 11 reads, in pertinent part:

> If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may . . . impose an appropriate sanction upon the attorneys, law firms, or parties . . . . A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. . . . the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

Fed. R. Civ. P. 11(c)(2)(emphasis added).

The plain language of the rule makes clear that the imposition of sanctions is discretionary and that any sanctions imposed should be fashioned as narrowly as possible to deter the improper conduct as opposed to effecting a fee-shifting. See e.g., Orlett v. Cincinnati Microwave, Inc., 954 F.2d 414, 419 (6th Cir. 1992) (finding that deterrence rather than compensation is the primary goal of Rule 11). Moreover, this Court notes that the rule states that an award of attorneys' fees and costs is appropriate only upon motion by a party. Consequently, while this Court is powerless to order such fees on its sua sponte order to show cause under Rule 11, this Court can impose such fees in granting plaintiffs' motion under Rule 11.

In support of the motion for Rule 11 sanctions, plaintiffs seek payment of attorneys' fees and costs incurred from the date of defendant Smittle's deposition through the date of filing for plaintiffs' response to the motion to dismiss by the defendants which this Court granted in the January 29, 1999 Order; that amount equals $57,483.76 in fees and $4,972.52 in costs. Alternatively, plaintiffs seek an award in the amount of $3,252.00 -- fees and expenses incurred in bringing the Rule 11 motion. Plaintiffs argue that defendant Smittle initiated and was instrumental in achieving the deletion of the "self-preservation" requirement from West Virginia law governing RBCH's. Moreover, the State Fire Marshal and the State Fire Commission were aware of the proposed changes to the law as well, according to plaintiffs. The defendants' failure to inform plaintiffs, this Court, and even their own counsel, according to plaintiffs, permitted the filing of a false affidavit by Smittle and permitted defendants' counsel to defend this action on the basis of unsupported contentions that the defendants' believed the "self-preservation" requirement was a proper exercise of the State's police power over the health and safety of its citizens. Such conduct, assert plaintiffs, should be sanctioned in accordance with the effort, time and expense that could have be avoided through a stay had the parties only known of the potential deletion of the "self-preservation" requirement.

In response to the order to show cause, the defendants maintain that their conduct is excusable because it was "inadvertent error" and the result of a lack of communication between counsel and defendants. (Mem. Resp. Order to Show Cause at 1). Additionally, defendants state that they were "simply not aware that the . . . revisions . . had an impact" on this litigation, suggesting that they merely propose amendments and it is the Legislature and the Legislative Rule Making Committee who approve amendments. Id. Also, the

defendants state that they are "contrite" and that a "rather stern lecture" given them by their counsel have had a greater impact than any monetary sanction could. Id. at 6. This Court disagrees.

This Court finds that as a state agency and an officer of a state agency, defendants should have been aware of the nature of this litigation. Further, because the "self-preservation" requirement was the root of this case, that defendants could not have known that its deletion would affect this litigation is doubtful, at best. Although this Court appreciates defendants' apology to the extent that one was given in the response to show cause, this Court finds that sanctions are warranted here. The parties were put to significant effort and expense in this case. At the same time, this Court recognizes that the primary purpose of Rule 11 is to deter and not to compensate and that the Rule directs courts to sanction narrowly to fit the offending conduct. In the light of these principles, this Court finds the following sanctions appropriate:

1. This Court finds the defendants' conduct worthy of reprimand. The failure to inform plaintiffs, this Court, and their own counsel of actions they took that could have saved a great deal of time, expense, and judicial resources was inexcusable.

2. Defendants are DIRECTED to pay to plaintiffs attorney's fees and costs in the amount of $3,252.00 within 10 days of the entry of this order.

IT IS SO ORDERED.

The Clerk is directed to transmit copies of this order to counsel of record herein.

ENTERED: April 21, 1999

s/ Frederick P. Stamp, Jr.
FREDERICK P. STAMP, JR.
UNITED STATES DISTRICT JUDGE

Dec 20, 2000

Supreme Court, U.S.
FILED
DEC 20 2000
OFFICE OF THE CLERK

No. 99-1848

In The

Supreme Court of the United States

BUCKHANNON BOARD AND CARE HOME, INC.; THE WEST VIRGINIA RESIDENTIAL BOARD AND CARE HOME ASSOCIATION; and on behalf of all others similarly situated,

Petitioners,

v.

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, et al.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF FOR THE RESPONDENTS

DARRELL V. MCGRAW, JR.
Attorney General

DAVID P. CLEEK
Senior Deputy Attorney General
Counsel of Record
SCOTT E. JOHNSON
Senior Assistant Attorney General
State Capitol, Room E-26
Charleston, West Virginia 25305
(304) 558-2021

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

QUESTION PRESENTED

Under Supreme Court Rule 24.2, the Respondents restate the question presented:

Is the catalyst theory a viable approach to govern federal courts in awarding fees under federal fee-shifting statutes?

LIST OF PARTIES

The list of parties as set forth in the Petitioners' Brief is accurate and will not be restated here.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES ii

CITATION OF REPORTS 1

JURISDICTION 1

STATUTORY AND CONSTITUTIONAL PROVISIONS 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 4

ARGUMENT 6

1. The language of fee shifting statutes is clear and supports the Court's conclusion in *Farrar* that prevailing party status is established only by a judgment, consent decree or settlement 6

2. *Farrar* provides a sound rule for determining prevailing party that is simple, fair and expeditious and pays due respect for the need of the popular branches of government to function without fear that their decisions will be retroactively linked to litigation 12

   A. Catalyst theory requires proof of causation between a lawsuit and an act of government and that connection cannot be established when a change in conduct is effected by a legislature 12

   B. *Farrar* is consistent with the institutional concern this Court has shown for the effect that litigation has on government officials whose time and energies will be diverted from their public duties and whose decisions will be inhibited by the specter of the litigation 18

TABLE OF CONTENTS – Continued

Page

3. The adoption of the *Farrar* approach will not adversely affect plaintiffs but will continue to provide a means of vindicating the interests of the individuals as private attorneys general 21

CONCLUSION 23

TABLE OF AUTHORITIES

Page

CASES

Appalachian Power Co. v. Tax Department, 466 S.E.2d 424 (W. Va. 1995)..... 2

Bender v. Williamsport Area School Dist., 475 U.S. 534 (1986)..... 14

Bogan v. Scott-Harris, 523 U.S. 44 (1998).....16, 19

Boos v. Barry, 485 U.S. 312 (1988) 15

Bread Political Action Committee v. F.E.C., 455 U.S. 577 (1982)..... 16

Brown v. Local 58, I.B.E.W., 76 F.3d 762 (6th Cir. 1996)..... 7

City of Burlington v. Dague, 505 U.S. 557 (1992)....5, 12

DiMier v. Gondles, 676 F.2d 92 (4th Cir. 1982)..... 20

Farrar v. Hobby, 506 U.S. 103 (1992) ..... *passim*

Fogerty v. Fantasy, Inc., 510 U.S. 517 (1994)..... 6

Foreman v. Dallas County, 193 F.3d 314 (5th Cir. 1999).....12, 14

Harlow v. Fitzgerald, 457 U.S. 800 (1982)..... 18

Hart Book Stores, Inc. v. Edmisten, 612 F.2d 821 (4th Cir. 1979) 15

Harris Trust Savings Bank v. Salomon Smith Barney, Inc., 120 S. Ct. 2180 (2000)..... 9

Hendricks v. Bowen, 847 F.2d 1255 (7th Cir. 1988) 17

Hensley v. Eckerhart, 461 U.S. 424 (1983).....5, 12

TABLE OF AUTHORITIES – Continued

Page

Hewitt v. Helms, 482 U.S. 755 (1987) 6, 8

Hirschey v. F.E.R.C., 777 F.2d 1 (D.C. Cir. 1985) 11

LaRouche v. Kezer, 20 F.3d 68 (2d Cir. 1994) 6

Maher v. Gagne, 448 U.S. 122 (1980) 9

Marek v. Chesny, 473 U.S. 1 (1985) 6

Meadows v. Hechler, 462 S.E.2d 586 (W. Va. 1995) 13

Michael M. v. Sonoma County, 450 U.S. 464 (1981) 14

Milton v. Shalala, 17 F.3d 812 (5th Cir. 1994) 17

New York State Ass'n of Career Schools v. State Educ. Dep't, 762 F. Supp. 1124 (S.D.N.Y. 1991) 17

Overseas Educ. Ass'n v. F.L.R.A., 876 F.2d 960 (D.C. Cir. 1989) 16, 17

Owen v. City of Independence, 445 U.S. 622 (1980) 20

Petrone v. Secretary of Health and Human Services, 936 F.2d 428 (9th Cir. 1991) (per curiam) 17

Pierce v. Underwood, 487 U.S. 552 (1988) 13

Powell v. McCormack, 395 U.S. 486 (1969) 21

Pulliam v. Allen, 466 U.S. 522 (1984) 20, 21

Soon Hing v. Crowley, 113 U.S. 703 (1885) 15

Spallone v. United States, 493 U.S. 265 (1990) .. 18, 20, 21

State of Rhode Island v. Narragansett Indian Tribe, 19 F.3d 685 (1st Cir. 1994) 15

S-1 and S-2 v. State Board of Education, 21 F.3d 49 (4th Cir. 1994) (per curiam) (en banc) 4

Tenney v. Brandhove, 341 U.S. 367 (1951) 16

TABLE OF AUTHORITIES – Continued

Page

Truax v. Bowen, 842 F.2d 995 (8th Cir. 1988) 17

United States v. Locke, 471 U.S. 84 (1985) 11

United States v. O'Brien, 391 U.S. 367 (1968) 14

Williams v. Taylor, 120 S. Ct. 1479 (2000) 7

STATUTES

42 U.S.C. § 12205 7

42 U.S.C. § 1988 10

42 U.S.C. § 3613(c)(2) 7

Fed. R. Evid. 602 15

Fair Housing Amendments Act, 42 U.S.C. §§ 3601-3619 ..... 3, 4, 7

Titles II and III of the Americans with Disabilities Act 4

STATE STATUTES

I 1998 W. Va. Acts 983-986 4

II 1998 W. Va. Acts 1198-99 4

W. Va. Code of State Rules, tit. 87, ser. 1, § 14.7.1 3

W. Va. Const. art. 5, § 1 13

W. Va. Const. art. VI, § 1 13

W. Va. Const. art. VII, §§ 1 & 2 14

W. Va. Code § 16-5H-1 3

W. Va. Code § 16-5H-1 to -18 1

TABLE OF AUTHORITIES – Continued

Page

W. Va. Code § 16-5H-2(l) 3

W. Va. Code § 16-5H-2(j) 3

W. Va. Code § 16-5H-3(a)-(c) 2

W. Va. Code Chapter 29A, Article 3 2

W. Va. Code § 29A-3-12 2

W. Va. Code § 29-3-5(a) 2

West Virginia Fire Control and Prevention Act, W. Va. Code § 29-3-1 to -25 2

W. Va. Code § 29A-5-15 to -15(b) 2

OTHER

S. Rep. No. 94-1001, *reprinted in* 1976 U.S.C.C.A.N. 5908 10

H.R. Rep. 94-1558, at 7 (1976) 10

Black's Law Dictionary (7th ed. 1999) 8

32 *The Council of State Governments, The Book of the States* (1998) 2, 3

Rich Jones, *State Legislatures, in 30 The Council of State Governments, The Book of the States* (1994) 18

W. Page Keeton, et al., Prosser & Keaton on the Law of Torts (5th ed. 1984) 13

Greg Moore, *Goldman to Lay Off Eight City Workers, Official Says,* Charleston (W. Va.) Gazette, Nov. 28, 2000, at C1 22

TABLE OF AUTHORITIES – Continued

Page

2 Martin A. Schwartz & John E. Kirklin, *Section 1983 Litigation: Claims, Defenses, and Fees* § 17.3 (2d ed. 1991) 6

Joel H. Trotter, Comment, *The Catalyst Theory of Fee Shifting After Farrar v. Hobby,* 80 Va. L. Rev. 1429 (1994) 9, 11

CITATION OF REPORTS

The citation of reports set forth in the Petitioners' Brief is accurate and will not be restated here.

JURISDICTION

The Petitioners properly invoke the certiorari jurisdiction of this Court.

STATUTORY AND CONSTITUTIONAL PROVISIONS

The statutory provisions at issue in this case are accurately set forth in the Petitioners' Brief and will not be restated here.

STATEMENT OF THE CASE

The West Virginia Residential Board and Care Homes Statute (RBCH Statute), W. Va. Code § 16-5H-1 to -18, empowers the Secretary of the West Virginia Department of Health and Human Resources (or his or her designee) to, *inter alia*, enforce rules and standards for residential board and care homes which the Secretary has adopted, promulgated, amended or modified, to exercise as sole authority all powers relating to residential board and care homes' license issuance, suspension and revocation; and to enforce rules adopted, promulgated, amended or modified by the Secretary governing the qualification of applicants for residential board and care home licenses, including, but not limited to, educational requirements,

financial requirements, personal and ethical requirements. *Id.* § 16-5H-3(a)-(c).

The West Virginia Fire Control and Prevention Act, W. Va. Code §§ 29-3-1 to -25, creates the position of the West Virginia State Fire Marshal and the West Virginia State Fire Commission. The Fire Prevention and Control Act authorizes the Fire Commission to promulgate, amend and repeal regulations relating to the safeguarding of life and property from the hazards of fire and explosions. W. Va. Code § 29-3-5(a). The procedural mechanism for implementing this legislative directive is the West Virginia Administrative Procedures Act, found in Chapter 29A, Article 3 of the West Virginia Code (W. Va. APA).

Under the W. Va. APA, West Virginia's administrative agencies do not have the general and independent power to promulgate binding rules. Rather, with certain exceptions inapplicable here,[1] "legislative rules," (those having the force and effect of law) must be authorized by the West Virginia Legislature. *See* W. Va. Code § 29A-3-12. *See generally* 32 *The Council of State Governments, The Book of the States,* 122 n.*ll* (1998) (explaining that in West Virginia "State agencies have no power to promulgate rules without first submitting proposed rules to the legislature which must enact a statute authorizing the agency to promulgate the rule. If the legislature, during a regular session disapproves all or part of any legislative rule, the

[1] *See* W. Va. Code §§ 29A-5-15 to -15b (discussing "emergency rules"). For a general overview of the different types of rules in West Virginia, *see Appalachian Power Co. v. Tax Department,* 466 S.E.2d 424, 434 (W. Va. 1995).

agency may not issue the rule nor take action to implement all or part of the rule unless authorized to do so. However, the agency may resubmit the same or a similar proposed rule to the committee.")[2]

Under this authority, and prior to 1998, the Fire Commission promulgated certain regulations in the West Virginia Fire Code which included the term "self-preservation." W. Va. Code of State Rules, tit. 87, ser. 1, § 14.7.1. "Self-preservation" was defined to mean "A person is capable of removing his or her physical self from situations involving imminent danger, such as fire." *Id.* § 14.7. The West Virginia Residential Board and Care Homes (RBCH) statute also contained "self-preservation" language. W. Va. Code § 16-5H-1 (noting a state policy to encourage and promote resourcing to ensure the effective care and treatment of the physically or mentally impaired who depend on the care of others and who are capable of self-preservation); *id.* § 16-5H-2(*l*) (defining self-preservation as meaning "that a person is, at least, capable of removing his or herself from situations involving imminent danger, such as fire. . . . "); *id.* § 16-5H-2(j).

The Petitioners challenged the RBCH statute's self-preservation language and the Fire Code's self-preservation regulations. The Petitioners alleged the "self-preservation" language violated, and was pre-empted by the federal Fair Housing Amendments Act (FHAA), 42

[2] Many states have mechanisms that provide for legislative review of administrative rules, although not necessarily of the same type as West Virginia's. *Book of the States, supra* n. 1 at Table 3.26.

U.S.C. §§ 3601-3619, and Titles II and III of the Americans with Disabilities Act (ADA).

During the pendency of the litigation in district court, the West Virginia Legislature amended portions of the West Virginia RBCH statute by deleting the "self-preservation" language at issue in the case below. *See* I 1998 W. Va. Acts 983-986. The Legislature also amended the State Fire Code to delete any reference to "self-preservation." *See* II 1998 W. Va. Acts 1198-99. There is no evidence in the record to support petitioners' assertion that such changes were caused by the recognition that this lawsuit and persuasive expert discovery convinced the respondents that self preservation rules violated federal law.

The district court presiding over the litigation dismissed the case as moot in light of the legislative action. It also refused to award attorney's fees, considering itself bound by the Fourth Circuit precedent of *S-1 and S-2 v. State Board of Education*, 21 F.3d 49 (4th Cir.) (per curiam) (en banc), *cert. denied*, 513 U.S. 876 (1994). A panel of the Court of Appeals for the Fourth Circuit affirmed the district court's refusal on the basis of *S-1 and S-2*. The Court of Appeals subsequently refused the Petitioners' request for an en banc rehearing.

SUMMARY OF ARGUMENT

Although this Court has never spoken directly as to the validity of catalyst theory, the approach the Court took in *Farrar v. Hobby*, 506 U.S. 103, 111 (1992) is the test most consistent with the language of federal fee shifting

statutes, creates a proper respect for the Court's recognition that fee shifting statutes should be interpreted with an eye toward "easy administration," *City of Burlington v. Dague*, 505 U.S. 557, 566 (1992), recognizes the Court's admonition that the fee application "should not result in a second major litigation," *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) and best harmonizes the public policies identified by this Court.

Farrar provides that to be a prevailing party:

> a civil rights plaintiff must obtain at least some relief on the merits of his claim. The plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought, *Hewitt* [*v. Helms*, 482 U.S. 755,] 760, 96 L Ed 2d 654, 107 S Ct 2672, [2675 (1987)], or comparable relief through a consent decree or settlement, *Maher v. Gagne*, 448 U.S. 122, 129, 100 S Ct 2570, 2574, 65 L Ed 2d 653 (1980).

506 U.S. at 111.

The requirement of a judgment, consent decree or settlement makes judicial determination of prevailing party status easy and fair and avoids the possibility of prolonged and intrustive judicial examination of who is a prevailing party. A party under *Farrar* need only point to a judgment, consent decree, or settlement to establish prevailing party status.

Farrar's approach also protects the institutional interests of the popular branches of government. Public officials and legislators discharge their duties in light of multiple and varied considerations.

Catalyst theory discounts the interests these officials have in creating, implementing and administering public

policy in a political system that makes such officials accountable (either directly or indirectly) to the electorate. Catalyst theory risks subjecting public officials to intrusive, judicial inquiry concerning why they acted with the concomitant distraction of these officials from their duties and the chilling effect upon the exercise of their discretion. It also avoids opening a new avenue into the public treasury that would result in a diminution of vital government services.

ARGUMENT

1. The language of fee shifting statutes is clear and supports the Court's conclusion in *Farrar* that prevailing party status is established only by a judgment, consent decree or settlement.

"[The catalyst theory] doctrine has not yet been explicitly approved or rejected by the Supreme Court." *LaRouche v. Kezer*, 20 F.3d 68, 72 n.4 (2d Cir. 1994). This Court did not address the catalyst issue in *Hewitt v. Helms*, 482 U.S. 755, 763 (1987), saying, "We need not decide the circumstances, *if any*, under which this 'catalyst' theory could justify a fee award under § 1988. . . ." 482 U.S. at 763 (emphasis added).[3] However, the

[3] Congress has enacted over one hundred fee-shifting statutes. *Marek v. Chesny*, 473 U.S. 1, 43 (1985) (Brennan, J., dissenting) (appendix). When interpreting prevailing party statutes, this Court has concluded that they should all be given a common interpretation, *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 538 (1994), a viewpoint shared by the Congress. *See generally* 2 Martin A. Schwartz & John E. Kirklin, *Section 1983 Litigation: Claims, Defenses, and Fees* § 17.3 at 6 (2d ed. 1991) ("Congress and the Supreme Court alike have viewed § 1988 and other federal fee-shifting statutes that also provide for reasonable attorney's fees for the successful party in litigation as largely governed by the same interpretive standard.")

language of federal fee shifting statutes establishes that they do not encompass catalyst theory.

In interpreting a statute, the starting point is the language of the statute itself. *See, e.g., Williams v. Taylor*, 120 S. Ct. 1479, 1487 (2000) ("We start, as always, with the language of the statute.") There are two fee shifting statutes at issue in this case – the federal Fair Housing Amendments Act (FHAA) and the Americans with Disabilities Act (ADA). The FHAA provides, in pertinent part, "In a civil action under subsection (a) of this section, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs." 42 U.S.C. § 3613(c)(2). The ADA provides, in pertinent part:

> In any action or administrative proceeding commenced pursuant to this chapter, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs, and the United States shall be liable for the foregoing the same as a private individual.

42 U.S.C. § 12205. Each of these statutes authorizes the award of attorney's fees to "prevailing parties," not simply to anyone who acts as an agent for change or process or whose success comes in the political process – even if the political success was a response to the litigation. *Cf. Brown v. Local 58, I.B.E.W.*, 76 F.3d 762, 772 (6th Cir. 1996)

("We do not believe, however, that the catalyst theory was intended to allow recovery of fees for lawsuits that function as a kind of political advertisement.") Indeed, the legal term "prevailing party" is defined by one leading legal dictionary as "A party in whose favor a *judgment is rendered*, regardless of the amount of damages awarded. <in certain cases, the court will award attorney's fees to the prevailing party.>" *Black's Law Dictionary* 1145 (7th ed. 1999) (emphasis added). In short, a prevailing party is one who prevails *in* the litigation.

This Court has explained:

> [I]n *Texas State Teachers Assn. v. Garland Independent School Dist.*, 489 U.S. 782, 109 S.Ct. 1486, 103 L.Ed.2d 866 (1989), we synthesized the teachings of *Hewitt [v. Helms*, 482 U.S. 755 (1987)] and *Rhodes [v. Stewart*, 488 U.S. 1 (1988) (per curiam)]. "[T]o be considered a prevailing party within the meaning of § 1988," we held, "the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant." 489 U.S., at 792, 109 S.Ct., at 1493. We reemphasized that "[t]he touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties.' *Id.*, at 792-793, 109 S.Ct., at 1494.

Farrar v. Hobby, 506 U.S. 103, 111 (1992).

Farrar further explained that "to qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim. The petitioner must obtain an enforceable judgment against the defendant from whom fees are sought, *Hewitt [v. Helms,*] 482 U.S. [755,] 760, 107 S.Ct. [2672,] 2675 [(1987)], or comparable

relief through a consent decree or settlement, *Maher v. Gagne*, 448 U.S. 122, 129, 100 S.Ct. 2570, 2574, 65 L.Ed.2d 653 (1980)." *Id.* "*Only under these circumstances* can civil rights litigation effect 'the material alteration of the legal relationship of the parties' and thereby transform the plaintiff into a prevailing party. *Garland, supra*, at 792-793, 103 L Ed 2d 866, 109 S Ct, at 1486." *Id.* (emphasis added).

In short, a plaintiff prevails when the plaintiff achieves "a material alteration in the legal relationship of the parties." This material alteration must be accomplished *in* the litigation – that is, the legal alteration is accomplished only when a federal court places the authority of the federal bench behind the alteration such that the failure of a defendant to follow through with the duties under the altered relationship is an affront to the authority of the federal court. Such judicial imprimatur is achieved only when there is a judgment, settlement or consent decree. *See Farrar*, 506 U.S. at 111.[4]

Because the language of the statutes at issue here is clear, the analysis should be at an end. *See, e.g., Harris Trust Savings Bank v. Salomon Smith Barney, Inc.*, 120 S. Ct. 2180, 2191 (2000) (quoting *Hughes Aircraft v. Jacobson*, 525

---

[4] The *Farrar* characterization of prevailing party as requiring a judgment captured not simply an agreement of only a majority of the bench, but the assent of all nine justices of the Court. Joel H. Trotter, Comment, *The Catalyst Theory of Fee Shifting After Farrar v. Hobby*, 80 Va. L. Rev. 1429, 1447 (1994) ("And not merely a majority, but all nine of the Justices applied the enforceable judgment requirement.")

U.S. 432, 438 (1999)) (" 'in any case of statutory construction, our analysis begins with the language of the statute. . . . And where the statutory language provides a clear answer, it ends there as well.' ") However, the Petitioners and their amici have cited both the House of Representative and Senate Committee Reports that accompanied § 1988. *See, e.g.*, Brief of Friends of the Earth, et al., as Amici Curiae in Support of Petitioners' at 13-14 (citing and quoting S. Rep. No. 94-1001, at 5, *reprinted in* 1976 U.S.C.C.A.N. 5908, 5912; H.R. Rep. 94-1558, at 7 (1976)); Brief for Public Citizen and the ACLU as Amici Curiae in Support of Petitioners at 11-12 (quoting H.R. Rep. 94-1588, at 7).

S. Rep. 94-1001, at 5, reads, in part, "[F]or purposes of an award of counsel fees, parties may be considered to have prevailed when they vindicate rights through consent judgment or without formally obtaining relief." H.R. Rep. 94-1558, at 7, read, in part:

> "A 'prevailing' party should not be penalized for seeking an out of court settlement, thus helping to lessen docket congestion. Similarly, after a complaint is filed, a defendant might voluntarily cease the unlawful practice. A court should still award fees even though it might conclude, as a matter of equity, that no formal relief, such as an injunction, is needed."[5]

However, section "1988's legislative history does not demand a catalyst theory at all but instead can be read merely to emphasize that a plaintiff should be able to

[5] The bill that became 42 U.S.C. § 1988 was originally S. 2278, 94th Cong. (1976). The Senate bill passed in lieu of the House of Representatives bill. *See* 1976 U.S.C.C.A.N. at 5908.

recover fees 'without formally obtaining relief,' " and, of course, a "plaintiff may still do so under *Farrar*, for a favorable settlement will confer prevailing party status." Trotter, *supra*, note 4, at 1447 & n.136. Indeed, non-formal relief as cited in the Senate Report accompanying section 1988 would, of course, include a voluntary settlement. In short, *Farrar* clarifies the "prevailing party" inquiry by stressing that a voluntary change in conduct must be accompanied by an enforceable settlement agreement to transform a plaintiff into a prevailing party for purposes of fee shifting statutes.

Finally, the use of legislative history in interpreting legislation is, at best, an exercise in futility and, at worst, a judicial usurpation of the legislative function. When Congress members vote, they vote on language in a bill – not upon committee reports. *See, e.g., Hirschey v. F.E.R.C.*, 777 F.2d 1, 8 n.1 (D.C. Cir. 1985) (Scalia, J., concurring) (quoting 128 Cong. Rec. S8659) (daily ed. July 19, 1982) (statement of Sen. Armstrong) (" . . . [F]or any jurist, administrator, bureaucrat, tax practitioner, or others who might chance upon the written record of this proceeding, let me just make the point that this is not the law, it was not voted on, it is not subject to amendment, and we should discipline ourselves to the task of expressing congressional intent in the statute.") "[D]eference to the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of a bill, generally requires us to assume that 'the legislative purpose is expressed by the ordinary meaning of the words used.' " *United States v. Locke*, 471 U.S. 84, 95 (1985) (quoting *Richards v. United States*, 369 U.S. 1, 9 (1962)), and there is no evidence that the statements in the Committee reports were voted on by Congress.

2. *Farrar* provides a sound rule for determining prevailing party status that is simple, fair and expeditious and pays due respect for the need of the popular branches of government to function without fear that their decisions will be retroactively linked to litigation.

A. Catalyst theory requires proof of causation between a lawsuit and an act of government and that connection cannot be established when a change in conduct is effected by a legislature.

The bright line test *Farrar* articulated is in keeping with this Court's admonitions that the fee application "should not result in a second major litigation," *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983), and that fee-shifting statutes should be interpreted with an eye toward easy administrability. *City of Burlington v. Dague*, 505 U.S. 557, 566 (1992). The *Farrar* approach creates a bright line rule leading to ease of administration and conservation of scarce judicial resources. A prevailing party under the *Farrar* test is readily discerned by simple reference to a judgment, consent decree or settlement.

The dangers attendant to the catalyst theory are prodigious and risk the very results (long, drawn-out litigation that ensnares courts in complex legal and factual issues) which this Court's fee-shifting opinions have eschewed. Catalyst theory requires demonstration of a causal connection between a lawsuit and the action of the defendants. *See, e.g., Foreman v. Dallas County*, 193 F.3d 314, 323-24 (5th Cir. 1999). Catalyst theory is simply unworkable in cases such as this in which the change in conduct that forms the basis of the prevailing party claim consists of legislative action. Public officials act for a

variety of reasons. Linking legislative action to a lawsuit fails to appreciate the diversity and dynamics that motivate legislators.

Causation in the law is the general concept that "there be some reasonable connection between the act . . . of the defendant and the damage which the plaintiff has suffered." *W. Page Keeton, et al., Prosser & Keaton on the Law of Torts* § 41, at 263 (5th ed. 1984). "There is perhaps nothing in the entire field of law which has called forth more disagreement, or upon which the opinions are in such a welter of confusion." *Id.* This Court has recognized that the government's decision to settle a case (even if on unfavorable grounds) does not equate with being motivated by the suit. Other grounds, such as a change in policy instituted by a new administration, could just as easily account for the change. *Pierce v. Underwood*, 487 U.S. 552, 568 (1988). A judicially enforceable order placing judicial authority behind the resolution of the case negates any need for possibly expensive, time-consuming and intrusive judicial inquiry into who is a prevailing party.

Here, it was not a party who acted, but a state legislature.[6] When a representative governmental body acts, it

---

[6] The separation of powers it is an explicit constitutional command of West Virginia's organic charter. W. Va. Const. art. 5, § 1. *See State ex rel. Meadows v. Hechler*, 462 S.E.2d 586, 589 (W. Va. 1995) ("The separation of powers doctrine expressly stated in our constitution is a core principle of our system of government . . . "). The West Virginia Constitution not only creates a tripartite governmental system, it creates a diffusion within the branches of government as well, establishing a bicameral legislature, W. Va. Const. art VI, § 1, and a non-

acts as a body, not a conglomeration of individuals. *Cf. Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 545 (1986) (individual member of school board lacked standing to appeal an order when the board did not vote to appeal order). Indeed, this Court has recognized, "[i]nquiries into Congressional motives or purposes are a hazardous matter," *United States v. O'Brien*, 391 U.S. 367, 383 (1968), as legislators act for a variety of reasons. *See Michael M. v. Sonoma County*, 450 U.S. 464, 470 (1981) (plurality opinion). *See also Foreman v. Dallas County*, 193 F.3d 314, 321-22 (5th Cir. 1999) (recognizing that attribution of a causative relationship between a lawsuit and a legislative act is a hazardous undertaking as the legislative process is fraught with compromises, competing interests and unspoken motives). As this Court correctly observed more than a century ago, "[t]he diverse character of such motives, and the impossibility of penetrating

---

unitary executive. *Id.* art. VII, §§ 1 & 2. West Virginia, far from creating a monolithic governmental structure, has chosen to diffuse authority to prevent that "accumulation of all powers . . . in the same hands . . . " that "may justly be pronounced the very definition of tyranny." *The Federalist* No. 47, at 269 (James Madison) (Clinton Rossiter ed. Mentor 1999). This separation also enhances political accountability. If the divisions of government are blurred or erased, the citizenry will not be able to discern who is the responsible (and, hence, accountable) actor in the polity, further diluting government accountability to the electorate. Thus, when an actor of the state acts, it may act for the state, but only within the sphere of the state actor's authority. If, however, the Respondents are seen to act as the state in proposing legislation, they may be entitled to the cloak of absolute legislative immunity.

into the hearts of men and ascertaining the truth, precludes all such inquiries as impracticable and futile." *Soon Hing v. Crowley*, 113 U.S. 703, 710-11 (1885). *See also Boos v. Barry*, 485 U.S. 312, 336 (1988) (Brennan and Marshal, JJ., concurring) ("The . . . analysis . . . plunges courts into the morass of legislative motive, a notoriously hazardous and indeterminate inquiry. . . . "). Catalyst theory, however, directly places legislative motivation into issue before the courts, which is a result at odds with the recognitions of this Court and accepted rules recognizing the hazards of such inquiry.

As a general evidentiary matter, individuals are limited to giving testimony on matters of which they have personal knowledge. *See* Fed. R. Evid. 602. Thus, while an individual legislator may testify as to why he or she personally voted in a particular matter[7], that legislator is not competent to testify as to the motives of other legislators or, for that matter, the legislative body as a whole. *Cf. State of Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 699 (1st Cir. 1994) (recognizing, *inter alia*, that Congressmen "cannot be expected to be familiar . . . with every other legislator's thoughts as to what the bill accomplishes (or stops short of accomplishing))." All of

---

[7] Of course, judicial inquiries into legislative motivation typically lead to dead ends. For example, in *Hart Book Stores, Inc. v. Edmisten*, 612 F.2d 821, 829 n.11 (4th Cir. 1979), the court of appeals explained that a bill's sponsor provided an affidavit attesting that he introduced the bill in the hope that it would ameliorate the conditions found in adult entertainment establishments. Two print reporters provided affidavits that attested the sponsor told them that the aim of the bill was to cut the profits of these businesses and drive them out of business.

which assumes legislators may be amenable to motivational inquiry by the judiciary – a conclusion much at odds with the historic practice of the federal courts. "The holding of this Court in *Fletcher v. Peck*, 6 Cranch 87, 130, 3 L ed 162, 176 that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned." *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951). *See also Bogan v. Scott-Harris*, 523 U.S. 44, 54-55 (1998) (quoting *Tenney*, 341 U.S. at 377).

Likewise, after-the-fact affidavits are accorded no probative weight because "[s]uch statements 'represent only the personal views of th[is] legislato[r], since the statements were [made] after passage of the Act.' " *Bread Political Action Committee v. F.E.C.*, 455 U.S. 577, 582 n.3 (1982) (quoting *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132, 95 S.Ct. 335, 42 L.Ed.2d 320 (1974), quoting *National Woodwork Manufacturers Assn. v. NLRB*, 386 U.S. 612, 639 n. 34, 87 S.Ct. 1250, 1265, 18 L.Ed.2d 357 (1967)). Even contemporaneous statements of legislative sponsors are of questionable value. *Overseas Educ. Ass'n v. F.L.R.A.*, 876 F.2d 960, 975 (D.C. Cir. 1989) (Buckley & Starr, JJ., concurring) (emphasis in original) ("Far less reliable, as sources of statutory meaning, are remarks made during floor debate – even 'authoritative' explanations offered by a bill's sponsors. While a sponsor's statements may reveal *his* understanding and intentions, they hardly provide definitive insights into *Congress'* understanding of the meaning of a particular provision.")[8] Catalyst theory

[8] And which presupposes that the speakers' views are even aired to his or her colleagues. *See* 112 Cong. Rec. S8795 (daily ed. July 25, 1996) (statement of Sen. McConnell) ("I do not see anyone on the Democratic side.") *See also Overseas Educ. Ass'n, Inc. v. F.L.R.A.*, 876 F.2d at 975 (concurring opinion) ("Few of his fellow legislators will have been on hand to hear the gloss the sponsor may have placed on a particular provision.")

is simply unworkable in cases such as this where legislative action is the purported basis for prevailing party status. As *Milton v. Shalala*, 17 F.3d 812, 815 (5th Cir. 1994) incisively notes:

> The mere possibility that Congress acted because of an individual claimant's suit (or reacted to a large number of similar suits) is too speculative in our view considering the many influences upon members of Congress in casting their votes. We agree with the cases that have refused to credit the change in law to a claimant's individual law suit and found the nexus between Congress's action and the law suit too attenuated.

See also Petrone v. Secretary of Health and Human Services, 936 F.2d 428, 430 (9th Cir. 1991) (per curiam); *Hendricks v. Bowen*, 847 F.2d 1255, 1258 (7th Cir. 1988); and *Truax v. Bowen*, 842 F.2d 995, 997 (8th Cir. 1988) (per curiam). Indeed, without evidence that the government actor who took the action that mooted the case even knew of the suit (much less was motivated by it), an award of attorney's fees is unsupportable. *See New York State Ass'n of Career Schools v. State Educ. Dep't*, 762 F. Supp. 1124, 1127 (S.D.N.Y. 1991).

B. *Farrar* is consistent with the institutional concern this Court has shown for the effect that litigation has on government officials whose time and energies will be diverted from their public duties and whose decisions will be inhibited by the specter of the litigation.

This Court has recognized that litigation against government officers distracts them from their public duties, inhibits their discretionary actions and deters other able individuals from seeking public service. *See, e.g., Harlow v. Fitzgerald,* 457 U.S. 800, 816 (1982). While *Harlow* addressed immunity, its rationale should help to guide this Court in the resolution of the catalyst theory issue. Indeed, this Court has looked to the immunity doctrine for guidance in cases where the immunity doctrines themselves were not directly involved. Thus, in *Spallone v. United States,* 493 U.S. 265, 278 (1990), this Court looked to the immunity doctrines as a guidepost governing the lower court's discretion in holding non-party city council members in contempt of court for failing to vote in favor of legislation to implement a consent decree entered into by the (party-defendant) city.

The dangers articulated in the immunity cases of distracting public officials from the discharge of the public weal are magnified when viewed in the context of directly representative bodies (such as the state legislature at issue in this case). The majority of state legislators serve only part time. *See* Rich Jones, *State Legislatures, in* 30 *The Council of State Governments, The Book of the States* 100 (1994) (citing a 1993 study by the National Conference of State Legislatures where 15% of legislators reported the legislature as their sole occupation, which

would increase to 24% if other categories [such as student or homemaker] were included). If these legislators were compelled to submit to interrogation in fee determination litigation, they would either have to testify during the legislative session (distracting them from the high responsibility of representing their constituents) or during non-legislative time (distracting them from their other occupations and creating an additional disincentive to their service in the legislature). And, it is highly doubtful whether legislators could even be compelled to so testify. *See, e.g., Bogan,* 523 U.S. at 54-55.

Moreover, the specter of judicial interference in government programs is manifest. Catalyst theory discourages public officials from exercising their public trust to take the initiative in revising outmoded ordinances or statutes or in improving institutional conditions, that are indisputably core government functions because under the catalyst theory such actions could serve as a proper basis for a fee award. Catalyst theory empowers courts to award fees for any change in behavior occurring after a lawsuit is filed – whether or not the court could have ultimately ordered that change in conduct or whether that conduct had previously survived judicial scrutiny. Thus, catalyst theory disables public officials, who may come to fear that worthwhile changes may be retroactively linked to a lawsuit and result in a hefty bill for attorney's fees. It is counterproductive to convert attorney's fees into a penalty on state and local officials for making salutary changes. As this Court has cogently emphasized, "any restriction on a legislator's freedom undermines the 'public good' by interfering with the rights of the people to representation in the democratic

process." *Spallone*, 493 U.S. at 279 (citation omitted). While this Court, as an empirical matter, found it questionable whether loss of government entity funds due to judicial order would deter a public officer of a conscientious exercise of his or her duties, *Owen v. City of Independence*, 445 U.S. 622, 656 (1980, several dissenting justices noted that the government paralysis occasioned by judicially exacted payments from the public treasury would, indeed, act to chill the judgment of committed public servants. *Id.* at 668-69 (Powell, J., dissenting). Whether the money is called damages or fees, its effect is the same. *Cf. Pulliam*, 466 U.S. at 545 ("Such a judgment poses the same threat to independent judicial decisionmaking whether it be labeled 'damages' of $7,691.09 or 'attorney's fees' in that amount.").

Indeed, the perverse results of catalyst theory are evidenced by the decisions of some lower courts. For example, In *DiMier v. Gondles*, 676 F.2d 92 (4th Cir. 1982), a plaintiff sued a sheriff in Virginia over the Sheriff's strip search policy. The policy had recently survived a separate suit. *Id.* at 93. During pendency of the *DiMier* suit, the Sheriff agreed to a temporary cessation of the policy and, subsequently, the Virginia General Assembly voted into existence legislation curtailing the circumstances supporting strip searches. *Id.* at 92. In affirming an award of attorney's fees, the Court of Appeals concentrated its discussion not on the legal merits of the case but upon " . . . the numerous exhibits of newspaper articles and editorials submitted by appellees," which evidenced that the "suit caused considerable publicity, both locally and nationwide, and 'increased political pressure' regarding the policy." *Id.* at 93. The threat of

retroactively enforced attorney fee awards after a government body acts as a result of the political process skews the relationship between the federal courts and the states and injects the federal judiciary into the popular and democratic political system which cannot help but "undermine[ ] the 'public good' by interfering with the rights of the people to representation in the democratic process." *Spallone*, 493 U.S. at 279. Legislators must be "free to represent the interests of their constituents without fear that they will be later called to task in the courts for that representation." *Powell v. McCormack*, 395 U.S. 486, 503 (1969). Indeed, "harassing litigation and its potential for intimidation increases in suits where the prevailing plaintiff is entitled to attorney's fees." *Pulliam v. Allen*, 466 U.S. 522, 555 (1984) (Powell, J., dissenting).

3. The adoption of the *Farrar* approach will not adversely affect plaintiffs but will continue to provide a means of vindicating the interests of the individuals as private attorneys general.

The adoption of *Farrar's* well-reasoned and cogent approach to prevailing party analysis will not leave prevailing plaintiffs without access to attorney's fees. Upon a judicial determination which vindicates their rights, as evidenced by a judgment, settlement or consent decree, plaintiffs will have established their status as prevailing parties with a concomitant entitlement to attorney's fees.

Further, there exist intrinsic and extrinsic political checks that would act as a brake upon a defendant simply deciding to cease the conduct at issue in the case in order to avoid attorney's fees. Intrinsically, when a government

defendant simply ceases a policy or program which is the subject of a suit, that defendant has surrendered the enforcement of a program to which he or she is politically committed. Such a surrender would necessitate a justification for the act before that defendant's constituency. The defendant's political accountability is a factor he or she would have to consider in their decision. Extrinsically, a government defendant not only has to justify his or her acts to their constituency, but will have to justify that act in simply abandoning a policy or program to either his or her political superiors (such as the executive or administrative agency heads) or the legislature or other representative body. A government defendants' continued political authority (or even continued political existence) is dependent upon the support of these other agents of government. The abdication of a policy, program or rule would necessitate justification extrinsic to the defendant through the defendant's superiors.[9]

---

[9] Most governments comprising the United States (states, counties and municipalities) live within budgets and lack the ability to confront fiscal shortfalls by printing money to supplement the public fisc. When faced with financial shortfalls, they must rely upon measures that either raise taxes or detrimentally affect the essential services of government upon which the population relies. *See, e.g.*, Greg Moore, *Goldman to Lay Off Eight City Workers, Official Says*, Charleston (W. Va.) Gazette, Nov. 28, 2000, at C1 (detailing West Virginia Capitol City's budget shortfall and explaining that jobs would be cut, positions not filled and neighborhood and community centers would reduce their hours of operation).

CONCLUSION

For the foregoing reasons, the decision of the lower court should be affirmed.

Respectfully submitted,

Respondents,
By counsel
DARRELL V. MCGRAW, JR.
Attorney General

DAVID P. CLEEK
Senior Deputy Attorney General
Counsel of Record
SCOTT E. JOHNSON
Senior Assistant Attorney General
Office of the Attorney General
State Capitol, Room E-26
Charleston, West Virginia 25305
(304) 558-2021

REPLY

BRIEF

JAN 5 2001 (15)
Supreme Court, U.S.
FILED
JAN 5 2001

Record No. 99-1848

In The Supreme Court of the United States

BUCKHANNON BOARD AND CARE HOME, INC.; THE WEST VIRGINIA RESIDENTIAL BOARD AND CARE HOME ASSOCIATION; and on behalf of all others similarly situated,

Petitioners,

v.

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

REPLY BRIEF FOR PETITIONERS

Webster J. Arceneaux, III*
LEWIS, GLASSER, CASEY & ROLLINS, LLP
Suite 700, One Valley Square
Charleston, WV 25301
(304) 345-2000

Brian A. Glasser
BAILEY & GLASSER, LLP
227 Capitol Street
Charleston, WV 25301
(304) 345-6555

Counsel of Record for Petitioners

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

29 pp

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTRODUCTION 1

ARGUMENT 2

I. THE CATALYST THEORY IS CONSISTENT WITH THE PLAIN MEANING OF THE TERM "PREVAILING PARTY." 2

II. THE CATALYST THEORY HAS BEEN APPLIED FOR OVER THIRTY YEARS WITHOUT ANY CONFUSION OR DIFFICULTIES. 10

III. THIS COURT SHOULD REMAND THIS CASE TO THE DISTRICT COURT FOR FURTHER PROCEEDINGS. 12

IV. THE *NADEAU* TEST IS THE BETTER STANDARD UNDER THE CATALYST THEORY FOR CONSIDERATION OF A MOTION FOR ATTORNEY'S FEES. . . 16

CONCLUSION 20

TABLE OF AUTHORITIES

FEDERAL CASES

Aleyska Pipeline Service Company v. Wilderness Society, 421 U.S. 240 (1975) 3

Associated Builders & Contractors of Louisiana v. Orleans Parish School Bd., 919 F.2d 374 (5th Cir. 1990) 18

Bank One, Chicago v. Midwest Bank & Trust Co., 516 U.S. 264 (1996) 4

Christiansburg Garment Co. v. E.E.O.C., 434 U.S. 412 (1978) 17

Church of Scientology v. City of Clearwater, 2 F.3d 1509 (11th Cir. 1993), *cert. denied*, 513 U.S. 807 (1994) 15

City of Riverside v. Rivera, 477 U.S. 561 (1986) 5

Collins v. Romer, 962 F.2d 1508 (10th Cir. 1992) 18

Crosby v. National Foreign Trade Council, 120 S.Ct. 2288 (2000) 4

Department of Commerce v. United States House of Representatives, 525 U.S. 316 (1999) 4

Farrar v. Hobby, 506 U.S. 103 (1992) ..... *passim*

Foreman v. Dallas County, 193 F.3d 314 (5th Cir. 1999) 15

Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167 (2000) 3,12

Hanrahan v. Hampton, 446 U.S. 754 (1980) (*per curiam*) 5

Harrington v. DeVito, 656 F.2d 264 (7th Cir. 1981) *cert. denied* 455 U.S. 993 (1982) 18

Hendricks v. Bowen, 847 F.2d 1255 (7th Cir. 1988) 15

Hensley v. Eckerhart, 461 U.S. 424 (1983) 5

Hirschey v. F.E.R.C., 777 F.2d 1 (D.C. Cir. 1985) 4

Jones v. United States, 526 U.S. 227 (1999) 4

Johnston v. Jago, 691 F.2d 283 (6th Cir. 1982) 18

Koster v. Perales, 903 F.2d 131 (2d Cir. 1990) 18

Maher v. Gagne, 448 U.S. 122 (1980) 5,19

Miller v. Staats, 706 F.2d 336 (D.C.Cir. 1983) 17

Milton v. Shalala, 17 F.3d 812 (5th Cir. 1994) 15

Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir. 1978) 11,17,18

Negonsott v. Samuels, 507 U.S. 99 (1993) 4

New York State Association of Career Schools v. State Education Department, New York, 762 F.Supp. 1124 (S.D. N.Y. 1991) 15

Parham v. Southwestern Bell Telephone Co., 433 F.2d 421 (8th Cir. 1970) 5,6

Paris v. United States Dept. of Housing & Urban Development, 988 F.2d 236 (1st Cir. 1993) 16

Petrone v. Secretary of Health and Human Services, 936 F.2d 428 (9th Cir. 1991) (*per curiam*) 15

Pierce v. Underwood, 487 U.S. 552 (1988) 19

Sablan v. Department of Finance, of the Commonwealth of the Northern Mariana Islands, 856 F.2d 1317 (9th Cir. 1988) 18

S-1 and S-2 v. State Board of Education, 21 F.3d 49 (4th Cir.)(*en banc*), *cert. denied*, 513 U.S. 876 (1994) 1, 10, 12

S-1 and S-2 v. State Board of Education, 6 F.3d 160 (4th Cir. 1993) 10

Staten v. Housing Authority of City of Pittsburgh, 638 F.2d 599 (3d Cir. 1980) 18

Texas State Teachers Association v. Garland Independent School District, 489 U.S. 782 (1989) 5

Truax v. Bowen, 842 F.2d 995 (8th Cir. 1988) 15

United Handicapped Federation v. Andre, 622 F.2d 342 (8th Cir. 1980) 18

FEDERAL STATUTES

Federal Fair Housing Amendments Act of 1988
42 U.S.C. §§ 3601, *et seq.* 11

42 U.S.C. § 3612(c)(2) 2,7

The Americans with Disabilities Act of 1990,
42 U.S.C. §§ 12132, 12182 11

42 U.S.C. § 12205 2,7

Civil Rights Attorney's Fees Awards Act of 1976
42 U.S.C. § 1988 ..... *passim*

Magnuson-Moss Warranty Act
15 U.S.C. § 2310(d)(2) 7

Equal Access to Justice Act
28 U.S.C. § 2412(d) 19

STATE STATUTES

W. Va. Code §§ 29A-3-9 13

W. Va. Code §§ 29A-3-11 and 12 13

LEGISLATIVE HISTORY

H.R. Rep. No. 1558, 94th Cong.,
2d Sess. (1976) 6

S. Rep. No. 1011, 94th Cong.,
2d Sess. (1976) 6

MISCELLANEOUS

Black's Law Dictionary (7th ed. 1999) 4, 8

Oxford English Dictionary (1970) 8

Random House Webster's Dictionary (2nd ed. 1987) 8

INTRODUCTION

The Plaintiffs moved for attorney's fees in the District Court under the catalyst theory. The District Court held that it was precluded from any such award based upon *S-1 and S-2 v. State Board of Education*, 21 F.3d 49 (4th Cir.)(*en banc*), *cert. denied*, 513 U.S. 876 (1994). The Plaintiffs now request this Court to consider the statutes at issue, this Court's prior decisions, a majority of the Courts of Appeals decisions, and hold that a party is deemed to have prevailed if there was a material alteration of the legal relationship between the parties that was caused by the lawsuit and the lawsuit was not frivolous, unreasonable, or groundless. This standard comports with the Congressional intent that private attorneys general be encouraged to file civil rights lawsuits in order that the public may be vindicated when laws are enforced.

The Defendants' Brief argues that the catalyst theory should be rejected under their view of *Farrar v. Hobby*, 506 U.S. 103 (1992). They argue that *Farrar* should be extended to establish a "bright line" test limiting the term "prevailing party" to one who achieves a judgment, settlement, or consent decree. They argue that this simple standard is preferable to the confusion that is engendered by the use of the catalyst theory. Alternatively, the Defendants assert that this Court should endorse a per se rule that attorney's fees are not available under the catalyst theory when a case is mooted by legislative action.

The catalyst theory has been embraced by the federal courts for over thirty years and this Court should hold that those

decisions are consistent with the intent of Congress. The Plaintiffs' seek nothing more from this Court than an affirmance of the catalyst theory and a remand to the District Court for consideration of their fee request. This Court should continue to allow development of the catalyst theory on a case by case basis and reject the Defendants' suggestion that a per se rule is necessary to preclude attorney's fees in all cases involving legislative action.

ARGUMENT

I. THE CATALYST THEORY IS CONSISTENT WITH THE PLAIN MEANING OF THE TERM "PREVAILING PARTY."

Both of the statutes at issue in this case, 42 U.S.C. § 3613(c)(2) and 42 U.S.C. § 12205, allow an award of attorney's fees to a "prevailing party." In the Plaintiffs' initial brief, they assert that under this Court's prior decisions, the legislative history of these two statutes, and, the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, the term "prevailing party" encompasses the catalyst theory. The Defendants' Brief argues that this Court should eschew that legislative history and look only to the plain meaning of the term "prevailing party." Under their view, Congress did not intend to allow a recovery of attorney's fees under the catalyst theory. The Defendants further argue that this Court should extend its decision in *Farar* to hold that only when a party

achieves a judgment, settlement, or consent decree are they entitled to recover their attorney's fees. They argue that this simple standard will eliminate any confusion in the courts that may result from the use of the catalyst theory.

The Defendants and the *Amici* in Support of Respondents all argue that this Court should not accept the catalyst theory because the decision in *Farrar* restricts attorney's fees in civil rights cases involving only judgments, settlements and consent decrees. They argue that this provides a simple standard that may be easily implemented by the courts below without any confusion. This interpretation of *Farrar* is at odds with this Court's recent decision in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 194 (2000), wherein it was recognized that *Farrar* "involved no catalytic effect." This statement explicitly recognizes that *Farrar* did not address the catalyst theory which arises in this case. Further, as this Court recognized in *Aleyska Pipeline Service Company v. Wilderness Society*, 421 U.S. 240 (1975), it is for Congress, not the Courts to establish the rules related to attorney's fees. Since Congress clearly endorsed the catalyst theory when it enacted § 1988 and the two statutes at issue in this case, this Court must uphold those enactments. This Court should reject the invitation of the Defendants and the *Amici* to create a standard to the contrary.

The Defendants' Brief, at pages 7-8, asserts that this Court should do nothing more than look at the plain language of the two statutes at issue and conclude:

> Indeed, the legal term "prevailing party" is defined by one leading legal dictionary as "A party in whose favor *a judgment is rendered*, regardless of the amount of damages awarded. <in certain cases, the court will award attorney's fees to the prevailing party.>" *Black's Law Dictionary* 1145 (7th ed. 1999). In short, a prevailing party is one who prevails *in* the litigation.

This Court should not ignore the legislative history of the statutes at issue.[1] Instead, it should look to the legislative history of § 1988 as it has done in prior cases. This Court has consistently referred to the legislative history of § 1988 to discern the meaning of the term "prevailing party." *See e.g.*

---

[1] In support of their argument that legislative history has no relevancy to this Court's inquiry, the Defendants cite to Justice Scalia's concurring opinion in *Hirschey v. F.E.R.C.*, 777 F.2d 1, 8 n.1 (D.C. Cir. 1985). Justice Scalia frequently objects to this Court's consideration of legislative history. *See e.g. Crosby v. National Foreign Trade Council*, 120 S.Ct. 2288, 2302 (2000)(Scalia, J. concurring) and *Bank One, Chicago v. Midwest Bank & Trust Co.*, 516 U.S. 264, 279 (1996) (Scalia, J. concurring). This Court has continued to consider legislative history in appropriate cases. *See e.g. Crosby, supra* at 2301, n.23 (legislative history of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, § 570, 110 Stat. 3009-166); *Jones v. United States*, 526 U.S. 227, 237-38 (1999) (legislative history of the federal carjacking statute, 18 U.S.C. § 2119); *Department of Commerce v. United States House of Representatives*, 525 U.S. 316, 342 (1999) (legislative history of the Census Act, 13 U.S.C. §§ 1, *et seq.*); *Bank One, Chicago, supra* at 273, (legislative history of the Expedited Funds Availability Act, 12 U.S.C. §§ 4001, *et seq.*) *Negonsott v. Samuels*, 507 U.S. 99, 106-07 (1993) (legislative history of the Kansas Act, 18 U.S.C. § 3243).

Texas State Teachers Association v. Garland Independent School District, 489 U.S. 782 (1989); *Hensley v. Eckerhart*, 461 U.S. 754 (1980); *Maher v. Gagne*, 448 U.S. 122 (1980); and, *Hanrahan v. Hampton*, 446 U.S. 754 (1980). *See also*, *City of Riverside v. Rivera*, 477 U.S. 561 (1986) (legislative history of § 1988 considered at length regarding proper calculation of reasonable attorney's fees).

The Plaintiffs' initial brief sets forth their arguments that the legislative history of § 1988 and the two statutes at issue shows that Congress intended the term "prevailing party" to encompass an award of attorney's fees under the catalyst theory and this Court should adhere to that intent. Similar arguments regarding the legislative history of § 1988 and the statutes at issue are made by the *Amici* in Support of the Petitioners. *See* U.S. Brief at 9-10, n.4 and 21-22; Friends of the Earth Brief at 13-15; and, Public Citizen at 9-11.

Defendants do not dispute or address the Plaintiffs' assertion that the catalyst theory first arose from the decision in *Parham v. Southwestern Bell Telephone Co.*, 433 F.2d 421 (8th Cir. 1970) and that the theory has been applied for thirty years in the federal courts across this country. The Brief of *Amici* National Conference of State Legislatures in Support of the Respondents, at pp. 12-13, invites this Court to examine the decision in *Parham*. That *Amici* asserts that *Parham* is consistent with their interpretation of *Farrar* that attorney's fees are only to be awarded in cases involving judgments, settlements, and consent decrees. Based upon this assertion,

the *Amici* argues that citation to *Parham* in the legislative history of § 1988 should not been seen as supporting the Plaintiffs' argument that Congress has endorsed the catalyst theory.

There is no doubt that the plaintiff in *Parham* never obtained any judgment, settlement or consent decree. Both the District Court and the Court of Appeals concluded that no final injunctive relief was warranted because the defendant's voluntary conduct eliminated any discriminatory conduct against African-Americans, *supra* at 429. Thus, when Congress cited to *Parham*, and stated that "parties may be considered to have prevailed when they vindicate rights through a consent judgment or *without formally obtaining relief*." S.Rep. No. 1011, 94th Cong., 2d Sess. 5 (1976) (emphasis added), it undoubtedly intended to recognize that a plaintiff is entitled to attorney's fees when their lawsuit leads to voluntary changes of unlawful conduct on the part of the defendant.[2]

The House Report, No. 1558, 94th Cong., 2d Sess. at 7 (1976) more forcefully relies upon *Parham* stating

[2] The Defendants' Brief, pp. 10-11 discusses this same passage of legislative history and suggest the language "without formally obtaining relief" only applies to settlements. Had Congress intended this limitation to settlements, it could have easily stated "or settlements." It did not so state. Rather it used very broad language "without formally obtaining relief," which includes settlements and the catalyst theory. Citation to *Parham* further evidences that Congress intended to allow the catalyst theory when it enacted § 1988 and the two statutes at issue in this case.

unequivocally that "[s]imilarly, after a complaint is filed a defendant might voluntarily cease the unlaswful practice. A court might still award fees even though it might conclude, as a matter of equity that no formal relief, such as an injunction, is needed." When a plaintiff's lawsuit catalyzes a defendant into making changes consistent with the relief requested, there should be no dispute that Congress intended that they be considered a prevailing party the same as any other party who obtains a judgment, settlement or consent decree.

Even if this Court were to limit its inquiry to the express terms of the statute, as suggested by the Defendants, under the plain meaning of the term "prevailing party," the catalyst theory would be allowed. Significantly, when Congress enacted 42 U.S.C. § 3613(c)(2) and 42 U.S.C. § 12205, it did not define the term "prevailing party" or place any restrictions on that term. Congress does not itself use the terms judgment, settlement, or consent decree in the statutes. Nor did Congress restrict the term "prevail" to conduct "*in* the litigation." Absent any restrictive language from Congress, this Court should not read in any such abridgments.[3]

[3] The *Amici* Alliance of Automobile Manufactures, Inc., at pp. 17-22, argue that not all fee shifting statutes use the same language. They state that the Magnuson-Moss Warranty Act, 15 U.S.C. § 2310(d)(2) provides "[i]f a consumer finally prevails in any action . . . he may be allowed by the court to recover as a part of the judgment" his attorney's fees. Were the term "judgment" included in the statutes at issue, the Defendants might have a different argument. However, the language of the Magnuson-Moss Warranty Act is not before this Court.

Furthermore, the definition of the term "prevail" has several meanings that support the catalyst theory.[4] A common first definition of the term "prevail" is to "become very strong, to gain vigour or force, to increase strength." *See Oxford English Dictionary* 1334 (1970), *See also, Random House Webster's Unabridged Dictionary* 1534 (2nd ed. 1987). Dictionaries also define the term "prevail" as "to get the better, to be victorious" and "to succeed in persuading, inducing or influencing." *Id.* These definitions support the catalyst theory. If a lawsuit induced or catalyzed the outcome that the plaintiff sought in the lawsuit, the plaintiff has prevailed.

The Plaintiffs lawsuit induced or catalyzed the Defendants to withdraw the self-preservation rules and under that definition, they can be seen as prevailing parties. Prior to any suit being filed, the State Fire Marshal adhered to the outdated self-preservation rules for eleven years after the National Fire Protection Association (NFPA) had issued the 1985 Life Safety Code standards for residential care homes. This caused the Office of Health Facility Licensure and Certification (OHFLAC) to issue three Cease and Desist Orders on October 18, 1996 requiring Buckhannon Board and Care

---

[4] The Defendants' Brief refers this Court to the definition of the term "prevailing party" in *Black's Law Dictionary* 1145 (7th ed. 1999). This definition is found under the definition of "party," not the term "prevail." The term "prevail" is defined in *Black's Law Dictionary* at 1206 as "[t]o obtain the relief sought in an action; to win a lawsuit." While this definition of "prevail" would include judgments, it also is arguably compatible with the Plaintiffs' claim that the catalyst theory is encompassed by the term "prevail."

Home (BBCH) to close its three residential care homes and expel all of its residents. (JA 46-66). Rather than comply with these orders, the Plaintiffs proceeded to District Court and obtained an Agreed Order prohibiting the closure and eviction of the residents.

The Plaintiffs prevailed by obtaining the entry of the Agreed Order. The Plaintiffs further prevailed when the District Court denied the Defendants' Motions to Dismiss (JA 102). Finally, the Plaintiffs prevailed when the State Fire Marshal decided after his deposition, and the depositions of the Plaintiffs' experts, to withdraw the self-preservation rules at issue. This is clearly a material alteration in the legal relationship between the parties that was caused by the lawsuit. Further, and most significantly, Plaintiff Dorsey Pierce was allowed to die with peace and dignity at BBCH at the age of 105, and no other persons in a residential care home in West Virginia were subject to evictions as a result of the rules.

In light of the plain meaning of the term "prevailing party," this Court should reaffirm that a party prevails when its lawsuit catalyzes the defendant into making changes consistent with the relief requested, even though the lawsuit does not proceed to judgment because it is rendered moot by the defendant's action. The Plaintiffs in this action clearly induced or catalyzed the Defendants into withdrawing their self-preservation rules and therefore, this Court should conclude that they are prevailing parties entitled to a hearing on their request for fees.

II. THE CATALYST THEORY HAS BEEN APPLIED FOR OVER THIRTY YEARS WITHOUT ANY CONFUSION OR DIFFICULTIES.

The Defendants and their *Amici* in Support have repeated the same four arguments against the catalyst theory first advanced by Chief Judge Wilkinson in his dissent in *S-1 and S-2 v. State Board of Education*, 6 F.3d 160 (4th Cir. 1993). The Plaintiffs addressed these arguments in their brief at pp.33-34. One of the arguments advanced by the Defendants and the *Amici* in Support of the Respondents, suggest that if this Court endorses the catalyst theory, it will open the floodgates of civil rights and other litigation across the country. It is pure conjecture that any litigation will increase as a result of the catalyst theory. No empirical evidence is offered by the Defendants or the *Amici*, that the catalyst theory has resulted in any additional civil rights litigation over the past thirty years.

This argument also ignores the fact that the catalyst theory is already the law in all circuits with the exception of the Fourth Circuit, which circuit also accepted that theory until the *en banc* decision in *S-1 and S-2* in 1994. This Court's decision to reaffirm the catalyst theory should preserve the *status quo* that has now existed for thirty years and one would not expect any increase in civil rights litigation.

Likewise, there is no empirical support for the Defendants' contention that the courts are confused in applying

the catalyst theory. A review of the case law that has developed over thirty years indicates that the district courts and courts of appeals apply the catalyst theory in an even handed manner. A majority of the courts have applied the *Nadeau v. Helgemoe*, 581 F.2d 275 (1st Cir. 1978) two part test without any confusion or discernable difficulty. *See* Pet. Brief at 31, n.13.

Lastly, Defendants argue that the catalyst theory inhibits public officials from voluntary action. Again, there is no empirical evidence offered by the Defendants or their *Amici* to support this assertion. When an agency is not in compliance with federal law, and that leads to litigation, a public officials actions to remedy the problem should be seen as induced or catalyzed conduct, not voluntary conduct. And under those circumstances, an award of fees is appropriate.

Furthermore, the facts of this case do not support the Defendants' argument. The District Court held as a matter of law that the Plaintiffs' Amended Complaint stated a valid cause of action under the Fair Housing Amendments Act of 1988, 42 U.S.C. §§ 3601, *et seq*. and the Americans with Disability Act OF 1990, 42 U.S.C. §§ 12132, 12182 (JA 102). Only after this lawsuit was filed and the depositions of the State Fire Marshal and the Plaintiffs' experts took place, did the State Fire Marshal determine that it was time to withdraw the outdated rules.

After declaring the suit moot, the District Court held that it could not consider the Plaintiffs' fee request under the

catalyst theory because of the decision in *S-1 and S-2*, although he further opined that the Plaintiffs "might prevail on this theory" (Pet. App. A17). The District Court did not find that the State Fire Marshal's conduct was entirely without blame, particularly in light of the fact that the self-preservation rules were withdrawn without notice to the plaintiffs, their own counsel and the court. In upholding Rule 11 sanctions against the State Fire Marshal in this case, the District Court implicitly recognized that the rule change was related to this lawsuit (JA 147).

III. THIS COURT SHOULD REMAND THIS CASE TO THE DISTRICT COURT FOR FURTHER PROCEEDINGS.

The Plaintiffs filed their Petition with this Court in order that their fee request could be considered in the District Court under the catalyst theory. The Plaintiffs have argued, as this Court stated in *Friends of the Earth, Inc., supra,* at 195, that it "is for the District Court, not this Court, to address in the first instance any request for reimbursement of costs, including fees." Despite that admonition, the Defendants have devoted a substantial portion of their Brief, pp. 12-17, to the proposition this Court should adopt a *per se* rule precluding fees in any case involving legislative activity. There is no basis for carving out an exception to the catalyst theory where the action that brought about the relief sought by the plaintiff was legislative action. Neither the statutory language or the legislative history suggests a different result if the relief sought in the lawsuit was obtained

through legislative action. Furthermore, the relief obtained here was not through legislative action. In the Plaintiffs' initial brief, at footnote three, the Plaintiffs explained that any legislative activity in this case is merely routine, mechanical oversight of rule-making in West Virginia. Therefore, the Defendants attempt to hide behind legislative activity in this case should be seen as oversimplified at best.[5]

The Defendants' arguments on legislative involvement in this case also overlooks two important points regarding West Virginia's rule-making process. First, the Defendants do not dispute the Plaintiffs' assertion in footnote three of the initial brief, that the vast majority of rules go through the legislature with little discussion or amendment. The second, and more significant point, is that this whole process is agency driven, *i.e.* the agency must promulgate the rules prior to the legislature having anything to act upon. A review of the exhibits attached to the Plaintiffs' Motion for attorney's fees establishes that the expected mechanical legislative oversight of the rule-making process under the West Virginia Code is precisely what occurred in this case. First, the State Fire Marshal proposed

---

[5] The laws in West Virginia regarding the rule-making process are simple and straightforward. Pursuant to W. Va. Code § 29A-3-9, an agency must first draft a proposed rule and then apply to the legislature for permission to promulgate the rule. W. Va. Code § 29A-3-11 next sets forth the procedure for the Legislative Rule-Making Review Committee to consider in recommending to the full legislature that the agency should be allowed to promulgate the requested rule. W. Va. Code § 29A-3-12 then sets forth how the legislature as a whole may approve or disapprove of the rules or may otherwise amend the rules.

rules to the State Fire Commission. The Commission in turn submitted proposed rules to the Legislative Rule-Making Review Committee and finally, the legislature as a whole approved the rules with little substantive changes.

Therefore, this is a case about agency conduct, not legislative activity. This Court should recognize that upon remand, the District Court may only focus on the State Fire Marshal and the State Fire Commission's decision to withdraw the self-preservation rules and not the actions of the West Virginia Legislature approving of those changes. Alternatively, the District Court may focus on the fact that the lawsuit prevented the Defendants from enforcing their Cease and Desist Orders from the inception of the lawsuit, until it was dismissed as moot.

Not only are the Defendants' arguments not factually supported in this case, they are also misplaced as a matter of law. There is no indication in cases applying the catalyst theory that courts have had difficulty applying it to cases involving legislative action such that a *per se* exception is warranted. Defendants argue that the determination whether legislative action was catalyzed by a lawsuit will inevitably be "complex," "intrusive," "long, drawn-out" and "unworkable." Defendants' Brief at pp. 12-13. While it may sometimes be difficult to determine whether legislative action was catalyzed by a lawsuit, that is also sometimes true with regard to agency actions and at other times the determination will be easy.

Four of the cases cited by Defendants involved claims that individual lawsuits had catalyzed enactment of the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794; the courts easily concluded that no individual plaintiff could establish that his lawsuit was the catalyst for this major congressional action. *See Milton v. Shalala*, 17 F.3d 812 (5th Cir. 1994), *Petrone v. Secretary of Health and Human Services*, 936 F.2d 428 (9th Cir. 1991) (*per curiam*), *Hendricks v. Bowen*, 847 F.2d 1255 (7th Cir. 1988), and *Truax v. Bowen*, 842 F.2d 995 (8th Cir. 1988). Similarly, in *New York State Association of Career Schools v. New York State Education Department*, 762 F.Supp. 1124 (S.D.N.Y. 1991), the court denied fees where there was simply "no evidence that either the Legislature or the Governor was at all aware of plaintiffs' lawsuit, let alone moved to enact the reform legislation as a result of it." *Id.* at 1126-27. And in the other case cited by defendants, *Foreman v. Dallas County*, 193 F.3d 314 (5th Cir. 1999), the court concluded that the plaintiffs were not catalysts because there was "no ... evidence in the legislative record" showing that the lawsuit was a significant basis for the action, and that "the ... legislature began the process of amending the [relevant statute] well before the plaintiffs initiated this action." *Id.* at 322.

Other courts have had equally little difficulty finding that litigation was the catalyst for legislative action. For example, in *Church of Scientology v. City of Clearwater*, 2 F.3d 1509 (11th Cir. 1993), *cert. denied*, 513 U.S. 807 (1994), the court found it "*undisputed* that the suit brought by

[Plaintiff] caused the City to amend the [unconstitutional] Ordinance." 2 F.3d. at 1513 (emphasis added). And *Paris v. United States Dept. of Housing & Urban Development*, 988 F.2d 236 (1st Cir. 1993), the court ordered fees awarded under a catalyst theory where "Congress specifically mentioned the case in the legislative history [of the amended statute] as being the "necessary" force behind its enactment." *Id.* at 241.

Finally, Defendants' policy-based argument that a legislature should be free to act in the public interest without facing the constraint of a potential fee award has no more force than the same argument made in regard to an executive official, who should also act in the public interest. Congress has made the judgment that attorney's fees should be available to prevailing parties in civil rights litigation, and that is the relevant public policy to be applied here.

Thus, there is no inherent obstacle to applying the catalyst theory to cases involving legislative action and this Court should reject a *per se* rule precluding awards of attorney's fees in such cases. In any event, this case should be remanded to the district court to make an appropriate determination under the catalyst theory.

IV. THE *NADEAU* TEST IS THE BETTER STANDARD UNDER THE CATALYST THEORY FOR CONSIDERATION OF A MOTION FOR ATTORNEY'S FEES.

The Plaintiffs' initial brief, at pages 40-43, asserts that this Court should follow the *Nadeau* two part test as the proper standard to be applied under the catalyst theory. This standard is used by a majority of the courts and it has been cited previously with approval by this Court. The Defendants have not addressed this argument but, the Solicitor General's Brief, at pp. 27-29, has proposed a different standard.

The Solicitor General argues that a plaintiff whose lawsuit induces voluntary compliance should only obtain attorney's fees if the suit had "legal merit." U.S. Brief at 27. This standard extends beyond the second part of the *Nadeau* test that only examines whether the legal premise of the suit was not "'frivolous, unreasonable, or groundless.'" *Nadeau, supra* at 281 (quoting *Christiansburg Garment Co. v. E.E.O.C.*, 434 U.S. 412, 422 (1978)). This test "requires courts to dismiss fee claims based wholly on frivolous lawsuits, but simultaneously constrains them from holding a full trial, or from making *ad hoc* predictions about [a] plaintiff's chances for success, on the merits." *Miller v. Staats*, 706 F.2d 336, 341 n.31 (D.C. Cir. 1983).

The *Nadeau* two part formulation has been followed in almost every circuit, in cases interpreting a variety of similarly worded federal fee-shifting statutes under which attorney's fees may be awarded to the prevailing party. Under it, courts have established a minimal threshold for testing the substantiality of a federal claim, and they have expressly rejected a searching

review to determine whether the plaintiff would have won on the merits of the claim.[6]

Although the U.S. Brief at 27 n.14, cites *Nadeau* with apparent favor, it goes on to ask this Court to adopt the standard: "whether the plaintiff's complaint had sufficient merit to withstand a motion to dismiss for lack of jurisdiction *or* failure to state a claim on which relief may be granted." Brief at 27 (citing Fed. R. Civ. P. 12(b)) (emphasis added). This Court should reject this rule for two reasons.

First, while this standard is met in this case, some cases may be concluded prior to any ruling on a motion to dismiss. Utilization of this standard then will effectively require the fee-seeking party to obtain a legal ruling on the merits after the case has been adjudged moot. Indeed, for the courts to stray beyond *Nadeau* in cases that are moot on the merits would appear to require them, in effect, to issue advisory opinions.

---

[6] *See, e.g., Collins v. Romer*, 962 F.2d 1508, 1514 (10th Cir. 1992) (not "frivolous or groundless"); *Associated Builders & Contractors of Louisiana v. Orleans Parish School Bd.*, 919 F.2d 374, 378 (5th Cir. 1990) (lacks "colorable merit"); *Koster v. Perales*, 903 F.2d 131, 136 (2d Cir. 1990) (not "frivolous, unreasonable, or groundless"); *Sablan v. Department of Finance of N. Mariana Islands*, 856 F.2d 1317, 1325 (9th Cir. 1988) (same); *Miller v. Staats*, 706 F.2d 336, 341 & n.31 (D.C. Cir. 1983) ("not wholly frivolous"); *Johnston v. Jago*, 691 F.2d 283, 287 (6th Cir. 1982) (not "patently frivolous"); *Harrington v. DeVito*, 656 F.2d 264, 266 (7th Cir. 1981) *cert. denied* 455 U.S. 993 (1982) (not "frivolous, unreasonable, or groundless"); *Staten v. Housing Authority of City of Pittsburgh*, 638 F.2d 599, 605 (3d Cir. 1980) ("not frivolous"); *United Handicapped Federation v. Andre*, 622 F.2d 342, 347 (8th Cir. 1980) (not "frivolous, unreasonable, or groundless").

Second, adopting a Rule 12(b)(6) standard as suggested by the Solicitor General is at odds with this Court's prior holding in *Maher v. Gagne*, 448 U.S. 122 (1980), wherein this Court affirmed an award of fees under § 1988 to plaintiffs who had obtained a consent decree, and would set a higher standard for an award of fees in catalyst cases than in cases resolved through consent decree. In *Maher*, the defendant's argued that fees could not be awarded where no formal judicial relief on the merits had been entered. This Court rejected that argument and strongly suggested that the settlement of non-frivolous claims, without more, is sufficient to entitle plaintiffs to fees. It is difficult to square *Maher* with a standard that requires district courts to decide the legal merits of cases in the context of fee disputes.[7]

---

[7] The Rule 12(b)(6) approach is also at odds with this Court's decision in *Pierce v. Underwood*, 487 U.S. 552 (1988), under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d). The EAJA provides the government with an unusual defense if it can show that its position on the merits was "substantially justified." But even under EAJA, this Court has cautioned other courts against deciding the merits during a fee dispute in a way that "effectively establish[es] circuit law in a most peculiar, second-handed fashion." *Pierce, supra* at 561. If, under EAJA, where the statutory defense demands that the district court look at the merits to some degree, this Court has said that legal rulings on the merits should not be announced in resolving fee disputes, there is no basis for a standard requiring merits determinations in mooted cases where the only requirement is that the plaintiff has prevailed.

CONCLUSION

Based upon the foregoing, this Court should hold that a party prevails when its lawsuit catalyzes the defendant into making changes consistent with the relief requested, even though the lawsuit does not proceed to judgment because it is rendered moot by the defendant's action. This Court should remand this case to the district court to consider the Plaintiffs' request for attorney's fees.

Respectfully submitted,

Webster J. Arceneaux, III*
LEWIS, GLASSER, CASEY & ROLLINS, LLP
Suite 700, One Valley Square
Charleston, West Virginia 25301
(304) 345-2000
**Counsel of Record*

Brian A. Glasser
BAILEY & GLASSER, LLP
227 Capitol Street
Charleston, WV 25301
(304) 345-6555

Counsel for Petitioners

January 5, 2001

Supreme Court, U.S.
FILED
NOV 20 2000

No. 99-1848

In the Supreme Court of the United States

BUCKHANNON BOARD AND CARE HOME, INC., ET AL., PETITIONERS

v.

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

SETH P. WAXMAN
Solicitor General
Counsel of Record

BILL LANN LEE
Assistant Attorney General

BARBARA D. UNDERWOOD
Deputy Solicitor General

JEFFREY P. MINEAR
Assistant to the Solicitor General

JESSICA DUNSAY SILVER
KEVIN K. RUSSELL
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether a plaintiff may recover attorney's fees under federal statutes making attorney's fees available to a prevailing party, when, as a result of the plaintiff's suit, the defendant voluntarily provides the plaintiff with requested relief.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Summary of argument	5
Argument:	
A plaintiff may recover attorney's fees under the prevailing party standard if, as a result of the plaintiff's suit, the defendant voluntarily provides the plaintiff with requested relief	8
A. This Court's decisions prior to *Farrar* v. *Hobby* manifested the understanding that a plaintiff may recover fees if the defendant has voluntarily provided requested relief	9
B. This Court's decision in *Farrar* v. *Hobby* does not repudiate the principle that a plaintiff may recover fees if the defendant voluntarily provides requested relief	16
C. The court of appeals' ruling is inconsistent with the language, legislative history, and purposes of federal legislation authorizing awards of attorney's fees to prevailing parties	20
D. This Court should remand the case for a determination of whether, under the facts of this case, an award of fees is appropriate	26
Conclusion	30

TABLE OF AUTHORITIES

Cases:	
Alden v. *Maine*, 527 U.S. 706 (1999)	25
Alyeska Pipeline Serv. Co. v. *Wilderness Soc'y*, 421 U.S. 240 (1975)	2, 9
American Constitutional Party v. *Munro*, 650 F.2d 184 (9th Cir. 1981)	12

Cases—Continued: Page

Barnett v. *W.T. Grant Co.*, 518 F.2d 543 (4th Cir. 1975) 22
Baumgartner v. *Harrisburg Housing Auth.*, 21 F.3d 541 (3d Cir. 1994) 16, 28
Beard v. *Teska*, 31 F.3d 942 (10th Cir. 1994) 16
Bonnes v. *Long*, 599 F.2d 1316 (4th Cir. 1979) 4, 12
Brecht v. *Abrahamson*, 507 U.S. 619 (1993) 19
Brown v. *Gaston County Dyeing Mach. Co.*, 457 F.2d 1377 (4th Cir.), cert. denied, 409 U.S. 982 (1972) 22
City of Riverside v. *Rivera*, 477 U.S. 561 (1986) 24, 25
Craig v. *Gregg County*, 988 F.2d 18 (5th Cir. 1993) 16
DeMier v. *Goudles*, 676 F.2d 92 (4th Cir. 1982) 15
Doe v. *Busbee*, 684 F.2d 1375 (11th Cir. 1982) 12
Evans v. *Sheraton Park Hotel*, 503 F.2d 177 (D.C. Cir. 1974) 22
Exeter-West Greenwich Regional Sch. Dist. v. *Pontarelli*, 788 F.2d 47 (1st Cir. 1986) 12
Farrar v. *Hobby*, 506 U.S. 103 (1992) ..... *passim*
Foreman v. *Dallas County*, 193 F.3d 314 (5th Cir. 1999), cert. denied, 120 S. Ct. 1673 (2000) 16
Foremaster v. *City of St. George*, 882 F.2d 1485 (10th Cir. 1989), cert. denied, 495 U.S. 910 (1990) 28
Friends of the Earth, Inc. v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 120 S. Ct. 693 (2000) 18, 20
Gerena-Valentin v. *Koch*, 739 F.2d 755 (2d Cir. 1984) 12
Grano v. *Barry*, 783 F.2d 1104 (D.C. Cir. 1986) 12
Gwaltney of Smithfield, Ltd. v. *Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987) 5, 14, 15, 19
Hanrahan v. *Hampton*, 446 U.S. 754 (1980) 10, 11
Hendricks v. *Bowen*, 847 F.2d 1255 (7th Cir. 1988) 29

Cases—Continued: Page

Hennigan v. *Ouachita Parish Sch. Bd.*, 749 F.2d 1148 (5th Cir. 1985) 12, 27
Hensley v. *Eckerhart*, 461 U.S. 424 (1983) 9, 10, 17, 21, 23
Hewitt v. *Helms*, 482 U.S. 755 (1987) ..... *passim*
Hishon v. *King & Spalding*, 467 U.S. 69 (1984) 27
Institutionalized Juveniles v. *Secretary of Pub. Welfare*, 758 F.2d 897 (3d Cir. 1985) 12
J & J Anderson, Inc. v. *Town of Erie*, 767 F.2d 1469 (10th Cir. 1985) 12
Kahan v. *Rosenstiel*, 424 F.2d 161 (3d Cir.), cert. denied, 398 U.S. 950 (1970) 23
Kay v. *Ehrler*, 499 U.S. 432 (1991) 23
Kilgour v. *City of Pasadena*, 53 F.3d 1007 (9th Cir. 1995) 16
Kimel v. *Florida Bd. of Regents*, 528 U.S. 62 (2000) 25
Kopet v. *Esquire Realty Co.*, 523 F.2d 1005 (2d Cir. 1975) 22
Little Rock Sch. Dist. v. *Pulaski County Special Sch. Dist. 1*, 17 F.3d 260 (8th Cir. 1994) 16, 27
Long v. *Bonnes*, cert. denied, 455 U.S. 961 (1982) 8, 27
Maher v. *Gagne*, 448 U.S. 122 (1980) 11
Marbley v. *Bane*, 57 F.3d 224 (2d Cir. 1995) 16, 29
Milton v. *Shalala*, 17 F.3d 812 (5th Cir. 1994) 29
Morris v. *City of West Palm Beach*, 194 F.3d 1203 (11th Cir. 1999) 16
Nadeau v. *Helgemoe*, 581 F.2d 275 (1st Cir. 1978) 10, 27
New Hampshire v. *Adams*, 159 F.3d 680 (1st Cir. 1998) 16
Newman v. *Piggie Park Enters., Inc.*, 390 U.S. 400 (1968) 23
Parham v. *Southwestern Bell Tel. Co.*, 433 F.2d 421 (8th Cir. 1970) 22
Paris v. *United States Dep't of Hous. and Urban Dev.*, 988 F.2d 236 (1st Cir. 1993) 29

Cases—Continued: Page

Payne v. *Board of Educ., Cleveland City Schs.*, 88 F.3d 392 (6th Cir. 1996) 16
Peltier v. *City of Fargo*, 533 F.2d 374 (8th Cir. 1976) 22
Pembroke v. *Wood County*, 981 F.2d 225 (5th Cir.), cert. denied, 508 U.S. 973 (1993) 27
Ramey v. *Cincinnati Enquirer, Inc.*, 508 F.2d 1188 (6th Cir, 1974), cert. denied, 422 U.S. 1048 (1975) 22-23
Rhodes v. *Stewart*, 488 U.S. 1 (1988) 13, 14, 28
Rice v. *Gates Rubber Co.*, 521 F.2d 782 (6th Cir. 1975) 22
Richards v. *Griffith Rubber Mills*, 300 F. Supp. 338 (D. Or. 1969) 22
Ruckelshaus v. *Sierra Club*, 463 U.S. 680 (1983) 14
S-1 and S-2 v. *State Bd. of Educ.*, 21 F.3d 49 (4th Cir.), cert. denied, 513 U.S. 876 (1994) ... 4, 5, 8, 16, 18, 21
S-1 by and through P-1 v. *State Bd. of Educ.*, 6 F.3d 160 (4th Cir. 1993), rev'd, 21 F.3d 49, cert. denied, 513 U.S. 876 (1994) 15, 18
Sosna v. *Iowa*, 419 U.S. 393 (1975) 26
Spencer v. *General Elec. Co.*, 894 F.2d 651 (4th Cir. 1990) 15
Stewart v. *Hannon*, 675 F.2d 846 (7th Cir. 1982) 12
Stewart v. *McGinnis*, 5 F.3d 1031 (7th Cir. 1993), cert. denied, 510 U.S. 1121 (1994) 27
Texas Teachers Ass'n v. *Garland Sch. Dist.*, 489 U.S. 782 (1989) 9, 13, 14, 20, 21
Thomas v. *Honeybrook Mines, Inc.*, 428 F.2d 981 (3d Cir. 1970), cert. denied, 401 U.S. 911 (1971) 22
Truax v. *Bowen*, 842 F.2d 995 (8th Cir. 1988) 29
United States v. *Concentrated Phosphate Export Ass'n*, 393 U.S. 199 (1968) 20
United States v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33 (1952) 19
University of Tex. v. *Camenisch*, 451 U.S. 390 (1981) 26

Cases—Continued: Page

Webster v. *Fall*, 266 U.S. 507 (1925) 19
Wheeler v. *Towanda Area Sch. Dist.*, 950 F.2d 128 (3d Cir. 1991) 28
Williams v. *Miller*, 620 F.2d 199 (8th Cir. 1980) 12
Wooldridge v. *Marlene Indus. Corp.*, 898 F.2d 1169 (6th Cir. 1990) 15
Young, Ex parte, 209 U.S. 123 (1908) 25
Zinn v. *Shalala*, 35 F.3d 273 (7th Cir. 1994) 16, 27

Statutes and rules:

Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.* 1
42 U.S.C. 12117(a) 1
42 U.S.C. 12132 3
42 U.S.C. 12188 1
42 U.S.C. 12188(a) 25
42 U.S.C. 12205 ..... 4, 9, 21
Civil Rights Act of 1964, 42 U.S.C. 2000a *et seq.*:
Tit II, 42 U.S.C. 2000a-3(b) 2, 25
Tit. VII, 42 U.S.C. 2000e-5(k) 2
Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. 1988 ..... 9, 10, 17, 21-22
42 U.S.C. 1988(b) (1994 & Supp. IV 1998) 1-2, 4, 9
Clean Water Act, 33 U.S.C. 1251 *et seq.*:
33 U.S.C. 1365 14
33 U.S.C. 1365(d) (1982) 14
Equal Access to Justice Act, 28 U.S.C. 2412 (1994 & Supp. IV 1998) 2
28 U.S.C. 2412(b) 9
28 U.S.C. 2412(d) 9
Fair Housing Amendments Act of 1988, 42 U.S.C. 3601 *et seq.* 1
42 U.S.C. 3604(f) 3
42 U.S.C. 3613(c) 21
42 U.S.C. 3613(c)(2) 1, 3, 9
42 U.S.C. 3614(d)(2) 1

Statutes and rules:	Page
Voting Rights Act of 1965, 42 U.S.C. 1973 *et seq.*:	
42 U.S.C. 1973*l* (e)	2
42 U.S.C. 1983 (1994 & Supp. IV 1998)	4
W. Va. Code §§ 16-5C-1 *et seq.* (1966)	3
Fed R. Civ. P. 12(b)	27
W. Va. Code St. R. (1996):	
Tit. 64, §§ 65-1 *et seq.*	3
Tit. 87, § 1-14.7	3
Miscellaneous:	
H.R. Rep. No. 1558, 94th Cong., 2d Sess. (1976)	2, 9, 10, 22, 25
H.R. Rep. No. 711, 100th Cong., 2d Sess. (1988)	9
H.R. Rep. No. 485, 101st Cong., 2d Sess. Pt. 2 (1990)	9
Model Rules of Professional Conduct, *reprinted in ABA/BNA Lawyers' Manual on Professional Conduct* (2000)	24
Note, *Civil Rights Attorney's Fees Awards in Moot Cases*, 49 U. Chi. L. Rev. 819 (1982)	28
S. Rep. No. 1011, 94th Cong., 2d Sess. (1976)	10, 11, 22, 23, 25
Webster's Third New International Dictionary (1976)	21

In the Supreme Court of the United States

No. 99-1848

BUCKHANNON BOARD AND CARE HOME, INC., ET AL., PETITIONERS

v.

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

Congress has authorized both the United States and private parties to enforce various anti-discrimination laws, including the Fair Housing Amendments Act of 1988, 42 U.S.C. 3601 *et seq.* (FHAA), and the Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.* (ADA). As an incentive to private enforcement efforts, Congress has authorized the award of attorney's fees to private plaintiffs who prevail under those and other civil rights laws. See 42 U.S.C. 3613(c)(2), 3614(d)(2) (FHAA); 42 U.S.C. 12117(a), 12188 (ADA); see also, *e.g.*, Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. 1988(b) (1994 & Supp. IV

1998); Voting Rights Act of 1965, 42 U.S.C. 1973*l*(e); Title II of the Civil Rights Act of 1964, 42 U.S.C. 2000a–3(b); Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(k). Because meritorious private enforcement actions provide an important complement to government civil rights enforcement efforts, see, *e.g.*, H.R. Rep. No. 1558, 94th Cong., 2d Sess. 1 (1976), the United States has a significant interest in the construction of the attorney's fees provisions in a manner that fully effectuates that purpose. At the same time, because the United States itself is subject to claims for attorney's fees by private plaintiffs who prevail under other federal statutes, see, *e.g.*, Equal Access to Justice Act, 28 U.S.C. 2412 (1994 & Supp. IV 1998), the United States has an interest in ensuring that statutes providing for attorney's fees are not construed more broadly than Congress intended and that fees are awarded only where Congress has deliberately departed from the traditional "American" rule that each party bears its own litigation expenses. See *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240 (1975). Although this case directly concerns the availability of attorney's fees only under the FHAA and the ADA, it will likely provide guidance on the availability of fees under a wide variety of federal fee-shifting statutes. See *Hensley* v. *Eckerhart*, 461 U.S. 424, 433 n.7 (1983).

STATEMENT

Petitioners are the operators of residential board and care homes (RBCHs) in West Virginia. Pet. App. A7. RBCHs provide a group home environment—and an alternative to institutionalization—for persons who need assisted living but do not need specialized care, such as nursing services. *Ibid.* In 1996, state officials ordered petitioner Buckhannon Board and Care Home to close its RBCHs because those officials determined that some residents, such as 102-year-old Dorsey Pierce, could not satisfy the state fire safety

code's "self-preservation" requirement for RBCH residents. *Ibid.* That provision required that, in the event of a fire, all residents of a RBCH must be able to evacuate the building without prompting or assistance. *Ibid.* See W. Va. Code §§ 16-5C-1 *et seq.* (1996); W. Va. St. R. tit. 64, §§ 65-1 *et seq.* (1996); *id.* tit. 87, § 1-14.7 (1996).

Petitioners filed this action, which challenged both the self-preservation requirement and the specific order to remove residents from the RBCHs. They contended that the "self-preservation" provision was not required for fire safety in a group home that afforded other means of safe evacuation and that the rule conflicted with provisions of the FHAA and the ADA that prohibit discrimination against persons with disabilities. See 42 U.S.C. 3604(f) (FHAA); 42 U.S.C. 12132 (ADA). Pet. App. A7. On March 14, 1998, while the litigation was pending, the West Virginia legislature repealed the self-preservation requirement. *Id.* at A7, A11. On respondents' motion, the district court dismissed the case as moot. *Id.* at A7, A11, A16-A17.

Petitioners moved for attorney's fees under the fee provisions of the FHAA and the ADA. Pet. App. A7. The FHAA provides, in relevant part:

> In a civil action under subsection (a) of this section, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee.

42 U.S.C. 3613(c)(2). Similarly, the ADA provides in relevant part:

> In any action or administrative proceeding commenced pursuant to this chapter, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee.

42 U.S.C. 12205. Petitioners argued that, even though their case was dismissed, they nonetheless were prevailing parties, within the meaning of those statutes, because their lawsuit prompted the change in policy that mooted the case. Pet. App. A7-A8.

The district court denied the motion. Pet. App. A17-A19. The court stated that petitioners "might prevail on this theory" if it were available. *Id.* at A17. The court concluded, however, that the court of appeals' decision in *S-1 and S-2* v. *State Board of Education*, 21 F.3d 49, 51 (4th Cir.) (en banc), cert. denied, 513 U.S. 876 (1994), prohibited the award of attorney's fees under the circumstances presented here because the plaintiffs did not qualify as "prevailing parties" within the meaning of federal fee shifting statutes, which are construed in pari materia. See Pet. App. A17-A18.[1] The en banc court of appeals had ruled in *S-1 and S-2* that:

> 1. A person may not be a "prevailing party" plaintiff under 42 U.S.C. § 1988 except by virtue of having obtained an enforceable judgment, consent decree, or settlement giving some of the legal relief sought in a § 1983 action. *Farrar v. Hobby*, [506] U.S. [103] (1992).

[1] The *S-1 and S-2* litigation had involved a private suit under 42 U.S.C. 1983 (1994 & Supp. IV 1998), against state and city officials, seeking tuition reimbursement for handicapped students. The private plaintiffs obtained summary judgment and, while the case was on appeal, they reached a settlement with the city officials. The court of appeals concluded that the settlement mooted the case against the state officials, and the state legislature later enacted changes benefitting the private plaintiffs. The private plaintiffs then sought attorney's fees from the state defendants under 42 U.S.C. 1988(b) (1994 & Supp. IV 1998), which allows a "prevailing party" to recover its fees. The district court granted the fee request, and a court of appeals panel affirmed, relying on its prior decision in *Bonnes* v. *Long*, 599 F.2d 1316 (4th Cir. 1979). The en banc court of appeals reversed the fee award and overruled *Bonnes*, citing *Farrar* v. *Hobby*, 506 U.S. 103 (1992). See *S-1 and S-2*, 21 F.3d at 50-51.

> 2. The fact that a lawsuit may operate as a catalyst for post-litigation changes in a defendant's conduct cannot suffice to establish plaintiff as a prevailing party. "Catalyst theory," allowing that result, is no longer available for that purpose, *see Farrar*, [506] U.S. at [113], and cases such as *Bonnes v. Long*, 599 F.2d 1316 (4th Cir. 1979), which applied that theory, are overruled.
>
> 3. Here, the dismissal on appeal of an action under 42 U.S.C. § 1983 for prudential reasons as moot operates to vacate the judgment below, *see United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), and prevents the plaintiffs from being found prevailing parties by virtue of post-dismissal events. The plaintiffs therefore are not entitled to an award of attorney fees under 42 U.S.C. § 1988.

21 F.3d at 51 (parallel citations omitted). The district court concluded that the *S-1 and S-2* decision controlled the outcome of this case. Pet. App. A17-A18.

Petitioners appealed, and the court of appeals affirmed the district court's decision. Pet. App. A4-A8. The three-judge panel concluded that it was bound by the *S-1 and S-2* decision, *id.* at A7, and that, "[b]ecause the plaintiffs did not bring about the change in West Virginia law through any judgment, decree, or settlement, * * * the district court properly applied *S-1 and S-2* to this case," *id.* at A8. The court of appeals denied petitioners' request for rehearing en banc. *Id.* at A1-A3.

SUMMARY OF ARGUMENT

The court of appeals has erroneously concluded that a plaintiff cannot qualify as a "prevailing party," for purposes of awarding attorney's fees under federal civil rights legislation, unless the plaintiff obtains redress through a judicial judgment, consent decree, or out-of-court settlement.

Contrary to the views of every other court of appeals, that court has specifically rejected the possibility that a plaintiff may be entitled to an award of attorney's fees when the plaintiff obtains the relief it seeks through the defendant's voluntary, post-complaint compliance. The court of appeals reached that mistaken conclusion through a misunderstanding of this Court's decision in *Farrar* v. *Hobby*, 506 U.S. 103 (1992).

Prior to *Farrar*, this Court had expressed the understanding that a plaintiff "prevails," and is accordingly eligible for an award of attorney's fees, if the plaintiff succeeds through an enforceable judgment, a consent decree, an out-of-court settlement, or the defendant's voluntary, post-complaint change in conduct that redresses the plaintiff's grievances. See *Hewitt* v. *Helms*, 482 U.S. 755, 760-761 (1987). The courts of appeals, including the Fourth Circuit, had uniformly expressed that understanding as well. Indeed, the Court described that principle as "settled law." *Ibid.*; see also *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Found., Inc.*, 484 U.S. 49, 67 n.6 (1987).

The Court's decision in *Farrar* did not manifest any intention to change that principle. Indeed, *Farrar* did not address, explicitly or implicitly, the question whether a plaintiff may qualify as a "prevailing party" if the plaintiff obtains the relief it seeks through the defendant's post-complaint compliance. *Farrar* held that a plaintiff that litigates to judgment, but receives only nominal damages, qualifies as a "prevailing party" because the plaintiff receives actual relief that materially alters the relationship between the parties in a way that benefits the plaintiff. 506 U.S. at 111-112. If anything, *Farrar*'s rationale supports, rather than repudiates, the Court's prior endorsement of the principle at issue here. Like a plaintiff that receives nominal damages, a plaintiff that achieves the aim of its suit through the defendant's voluntary compliance receives actual relief

that resolves the legal dispute in a way that benefits the plaintiff.

The court of appeals' contrary ruling is inconsistent with the accepted meaning of a "prevailing party," is contrary to the unambiguous legislative history of relevant federal legislation, and would produce results that are irrational and contrary to the purposes of federal fee-shifting statutes. A plaintiff whose lawsuit induces voluntary compliance has no less need for or entitlement to an attorney's fee award than a plaintiff who achieves the same objective by litigating to judgment or reaching a settlement. Denying a fee award when the plaintiff obtains voluntary compliance would produce powerful disincentives for victims of discrimination to bring meritorious suits and would encourage attorneys to engage in gamesmanship that is far removed from the merits of the underlying dispute.

This Court should accordingly reject the court of appeals' categorical rule, reverse the judgment, and remand the case for a determination of whether petitioners qualify as "prevailing parties" under the specific facts of this case. The district court's determination should be guided by three central considerations: (1) whether petitioners' complaint had legal merit; (2) whether petitioners received actual relief that redressed their grievances; and (3) whether petitioners' lawsuit played a substantial role in inducing respondents to change their ways.

ARGUMENT

A PLAINTIFF MAY RECOVER ATTORNEY'S FEES UNDER THE PREVAILING PARTY STANDARD IF, AS A RESULT OF THE PLAINTIFF'S SUIT, THE DEFENDANT VOLUNTARILY PROVIDES THE PLAINTIFF WITH REQUESTED RELIEF

The Fourth Circuit, alone among the courts of appeals, has ruled that a person does not qualify as a "prevailing party," for purposes of federal attorney's fee statutes, "except by virtue of having obtained an enforceable judgment, consent decree, or settlement giving some of the legal relief sought." *S-1 and S-2* v. *State Bd. of Educ.*, 21 F.3d 49, 51 (4th Cir. 1994) (en banc). That court erroneously concluded that this Court's decision in *Farrar* v. *Hobby*, 506 U.S. 103 (1992), required that result. This Court's pre-*Farrar* decisions had accepted the proposition that a plaintiff may receive an award of attorney's fees if, as a result of the plaintiff's suit, the defendant voluntarily provided the requested relief. The Court's decision in *Farrar* did not call that practice into question. To the contrary, the practice is consistent with the language, legislative history, and purposes of fee-shifting statutes. This Court should accordingly reverse the judgment of the court of appeals and remand the case for determination of whether, under the facts of this case, an award of fees is warranted.[2]

[2] Courts and litigants frequently describe a court's award of attorney's fees in the absence of a formal judgment as resting on the "catalyst theory." See, *e.g.*, Pet. App. A7, A17. Because that shorthand phrase embraces several different approaches to the question presented here, see, *e.g.*, *Long* v. *Bonnes*, cert. denied, 455 U.S. 961 (1982) (Rehnquist, J., dissenting from denial of certiorari), we do not employ that terminology.

A. This Court's Decisions Prior To *Farrar* v. *Hobby* Manifested The Understanding That A Plaintiff May Recover Fees If The Defendant Has Voluntarily Provided Requested Relief

Under traditional practice in American courts, a party that seeks relief through the judicial process must pay its own attorney's fees. See *Alyeska Pipeline Serv. Co.* v. *Wilderness Society*, 421 U.S. 240 (1975). Congress, however, has modified that rule by statute in a number of important contexts. See, *e.g.*, Equal Access to Justice Act, 28 U.S.C. 2412(b) and (d); Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. 1988(b) (1994 & Supp. IV 1998). For example, many federal anti-discrimination laws, including the FHAA and the ADA, provide that a "prevailing party," other than the United States, may recover a "reasonable attorney's fee." See 42 U.S.C. 3613(c)(2) (FHAA); 42 U.S.C. 12205 (ADA). Congress has enacted those fee-shifting provisions "to ensure 'effective access to the judicial process' for persons with civil rights grievances." *Hensley* v. *Eckerhart*, 461 U.S. 424, 429 (1983) (quoting H.R. Rep. No. 1558, 94th Cong., 2d Sess. 1 (1976) (supporting passage of 42 U.S.C. 1988)).[3]

This Court stated in *Hensley*—and explicitly reiterated in *Texas Teachers Ass'n* v. *Garland School District*, 489 U.S. 782, 791-792 (1989)—that "plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of

[3] In accordance with Congress's intent, this Court has given the term "prevailing party" a consistent interpretation for all of the attorney's fees statutes in which that term appears. See *Hensley*, 461 U.S. at 433 n.7; H.R. Rep. No. 485, 101st Cong., 2d Sess. Pt. 2, at 140 (ADA) ("It is intended that the term 'prevailing party' be interpreted consistently with other civil rights laws."); H.R. Rep. No. 711, 100th Cong., 2d Sess. 16 & n.20 (1988) (fee provision of FHAA modeled on 42 U.S.C. 1988).

the benefit the parties sought in bringing suit." *Hensley*, 461 U.S. at 433 (quoting *Nadeau* v. *Helgemoe*, 581 F.2d 275, 278-279 ((1st Cir. 1978)). The Court has since recognized, based in part on the legislative reports that accompanied 42 U.S.C. 1988, that a plaintiff may qualify as a prevailing party even though the plaintiff has not litigated the issue to judgment. See S. Rep. No. 1011, 94th Cong., 2d Sess. 5 (1976) ("parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief"); H.R. Rep. No. 1558, *supra*, at 6-7 (accord). The Court's decisions indicate, in accordance with those reports, that a plaintiff may "succeed on [a] significant issue in litigation" through: (1) a consent decree; (2) an out-of-court settlement agreement; or (3) the defendant's voluntary cessation of the challenged practice. See *id.* at 7.[4]

The Court's decision in *Hanrahan* v. *Hampton*, 446 U.S. 754 (1980), noted that a plaintiff may qualify as a "prevailing party" on the basis of a consent judgment. The Court stated:

> The legislative history of the Civil Rights Attorney's Fees Awards Act of 1976 indicates that a person may in some circumstances be a "prevailing party" without having obtained a favorable "final judgment following a full trial on the merits." H.R. Rep. No. 94-1558, p. 7 (1976). See also S. Rep. No. 94-1011, p. 5 (1976). Thus, for example, "parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief," *ibid.* See also H.R. Rep. No. 94-1558, *supra*, at 7, and cases cited; *Dawson* v. *Pastrick*, 600 F.2d 70, 78 (CA7 1979); *Nadeau* v. *Helgemoe*, 581 F.2d 275, 279-281 (CA1 1978).

Id. at 756-757. The Court's decision in *Maher* v. *Gagne*, 448 U.S. 122 (1980), reached a similar conclusion with respect to settlements. The Court stated:

> The fact that respondent prevailed through a settlement rather than through litigation does not weaken her claim to fees. Nothing in the language of § 1988 conditions the District Court's power to award fees on full litigation of the issues or on a judicial determination that the plaintiff's rights have been violated. Moreover, the Senate Report expressly stated that "for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief."

Id. at 129 (quoting S. Rep. No. 1011, *supra*, at 5).

The Court's decision in *Hewitt* v. *Helms*, 482 U.S. 755 (1987), addressed, albeit indirectly, the consequences of a defendant's voluntary cessation of a challenged practice. The central issue in *Hewitt* was "the peculiar-sounding question whether a party who litigates to judgment and loses on all of his claims can nonetheless be a 'prevailing party' for purposes of an award of attorney's fees." *Id.* at 757. Helms had alleged that prison officials mistreated him, and a lower court rendered a favorable interlocutory ruling, but ultimately denied him any form of judicial relief. *Id.* at 760. This Court concluded that Helms was not entitled to an award of attorney's fees. *Id.* at 760-763. The Court explained:

---

[4] The House Report specifically states that "[t]he phrase 'prevailing party' is not intended to be limited to the victor only after entry of a final judgment following a full trial on the merits." H.R. Rep. No. 1558, *supra*, at 7. "If the litigation terminates by *consent decree*, for example, it would be proper to award counsel fees." *Ibid.* (emphasis added). "A 'prevailing' party should not be penalized for seeking an *out-of-court settlement*, thus helping to lessen docket congestion." *Ibid.* (emphasis added). "Similarly, after a complaint is filed, *a defendant might voluntarily cease the unlawful practice*. A court should still award fees even though it might conclude, as a matter of equity, that no formal relief, such as an injunction, is needed." *Ibid.* (emphasis added).

> It is settled law, of course, that relief need not be judicially decreed in order to justify a fee award under § 1988. A lawsuit sometimes produces voluntary action by the defendant that affords the plaintiff all or some of the relief he sought through a judgment—*e.g.*, a monetary settlement *or a change in conduct that redresses the plaintiff's grievances.* When that occurs, the plaintiff is deemed to have prevailed despite the absence of a formal judgment in his favor. See *Maher*, *supra*, at 129.

Id. at 760-761 (emphasis added).

As the quoted language makes clear, the Court's decision in *Hewitt* explicitly accepted, as "settled law," that a plaintiff "prevails," for purposes of an award of attorney's fees if: (a) the plaintiff's lawsuit seeks specific relief to address particular grievances; and (b) the defendant responds by taking voluntary action—including either a settlement *or* "a change in conduct"—that provides some or all of that relief.[5] The Court contrasted that situation with the one before it and concluded that "a favorable judicial statement of law in the course of litigation that results in judgment against the

[5] The Court had good reason to characterize this principle as "settled law." By 1987, numerous courts of appeals had recognized that a plaintiff may be entitled to an award of attorney's fees if the plaintiff received requested relief through the defendant's voluntary compliance. See *Exeter-West Greenwich Reg'l Sch. Dist.* v. *Pontarelli*, 788 F.2d 47, 53 (1st Cir. 1986); *Gerena-Valentin* v. *Koch*, 739 F.2d 755, 758-759 (2d Cir. 1984); *Institutionalized Juveniles* v. *Secretary of Pub. Welfare*, 758 F.2d 897, 911-912 (3d Cir. 1985); *Bonnes* v. *Long*, 599 F.2d 1316, 1319 (4th Cir. 1979); *Hennigan* v. *Ouachita Parish Sch. Bd.*, 749 F.2d 1148, 1150-1151 (5th Cir. 1985); *Stewart* v. *Hannon*, 675 F.2d 846, 851 (7th Cir. 1982); *Williams* v. *Miller*, 620 F.2d 199, 202 (8th Cir. 1980); *American Constitutional Party* v. *Munro*, 650 F.2d 184, 187-188 (9th Cir. 1981); *J & J Anderson, Inc.* v. *Town of Erie*, 767 F.2d 1469, 1474-1475 (10th Cir. 1985); *Doe* v. *Busbee*, 684 F.2d 1375, 1379 (11th Cir.1982); *Grano* v. *Barry*, 783 F.2d 1104, 1108 (D.C. Cir. 1986).

plaintiff does not suffice to render him a 'prevailing party.'" 482 U.S. at 763. The Court thus made clear that the "prevailing party" requirement focuses on whether, and to what extent, the plaintiff's lawsuit produces the tangible "end" result that the plaintiff sought. Accord *Texas Teachers Ass'n*, 489 U.S. at 792 ("the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant").[6]

The Court's decision in *Hewitt* also rejected Helms' "alternative" argument that he might be entitled to attorney's fees because his lawsuit prompted prison officials to amend prison regulations. The Court concluded that it "need not

[6] The Court specifically made that point in the course of rejecting Helms' argument that the lower court's favorable, but inconsequential, interlocutory ruling was the equivalent of declaratory relief. 482 U.S. at 761. The Court explained, "To suggest such an equivalency is to lose sight of the nature of the judicial process. In all civil litigation, the judicial decree is not the end but the means. At the end of the rainbow lies not a judgment, but some action (or cessation of action) by the defendant that the judgment produces—the payment of damages, or some specific performance, or the termination of some conduct. Redress is sought *through* the courts, but *from* the defendant." *Ibid.* The Court specifically observed:

> The real value of the judicial pronouncement * * * is in the settling of some dispute *which affects the behavior of the defendant towards the plaintiff.* * * * If the defendant, under the pressure of the lawsuit, pays over a money claim before the judicial judgment is pronounced, the plaintiff has "prevailed" in his suit because he has obtained the substance of what he sought. Likewise in a declaratory judgment action: if the defendant, under pressure of the lawsuit, alters his conduct (or threatened conduct) towards the plaintiff that was the basis for the suit, the plaintiff will have prevailed.

Ibid. Accord *Rhodes* v. *Stewart*, 488 U.S. 1, 4 (1988) (per curiam) ("A declaratory judgment, in this respect, is no different from any other judgment. It will constitute relief, for purposes of § 1988, if, and only if, it affects the behavior of the defendant toward the plaintiff.").

decide the circumstances, if any, under which this 'catalyst' theory could justify a fee award under § 1988" because Helms was not in prison at the time the prison officials amended the regulations and therefore could not have received "redress" through those regulations. *Hewitt*, 482 U.S. at 763. The Court also suggested that, even in the absence of that obstacle, Helms would additionally have had to show that his complaint requested the change in the regulations and that there was a "clear causal link between his lawsuit and the State's amendment of its regulations." *Ibid.*[7]

This Court addressed the issue of voluntary cessation again, shortly after the Court decided *Hewitt*, in *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987). That case arose from a private plaintiff's attempt to abate, through the citizen suit provisions of the Clean Water Act, 33 U.S.C. 1365, unlawful water pollution discharges. Those provisions allow citizens to bring private enforcement actions against polluters and authorize the courts to award attorney's fees to successful plaintiffs.[8] In the course of addressing the legal standards for determining

---

[7] See also *Rhodes*, 488 U.S. at 4 ("This case is thus controlled by our holding in *Hewitt*, where the fact that the respondent had 'long since been released from prison' and 'could not get redress' from any changes in prison policy caused by his lawsuit compelled the conclusion that he was ineligible for an award of fees.").

[8] At that time, the Clean Water Act authorized attorney's fees "whenever the court determines such award is appropriate." 33 U.S.C. 1365(d) (1982). Nevertheless, this Court interpreted the Clean Water Act to require that the plaintiff achieve at least "some degree of success on the merits." See *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 684-694 (1983). Thus, the Clean Water Act's attorney's fee provisions effectively imposed a "prevailing party" requirement like those contained in the civil rights laws. See *Texas Teachers Ass'n*, 489 U.S. at 791 (Under Section 1988, a plaintiff is a prevailing party if it "succeeded on any significant claim affording it some of the relief sought."). The current version of the Clean Water Act expressly limits fees to a "prevailing" party. 33 U.S.C. 1365(d).

when a citizen suit becomes moot, the Court noted that the Clean Water Act allows a court to award attorney's fees to a citizen plaintiff if, "as a result of a citizen proceeding and before a verdict is issued, a defendant abated a violation." 484 U.S. at 67 n.6. In *Gwaltney*, as in *Hewitt*, the Court envisioned that a plaintiff would be eligible to recover attorney's fees if, as a result of the plaintiff's suit, the defendant elected to forego litigation and to comply voluntarily with the plaintiff's demand for cessation of the unlawful practice. *Ibid.*

Taken collectively, the Court's pre-*Farrar* decisions manifest the Court's understanding that a plaintiff may recover attorney's fees under the "prevailing party" standard if, as a result of the plaintiff's suit, the defendant voluntarily provides the plaintiff with requested relief. To be sure, the Court has never had occasion, until now, to rule squarely on that specific issue in a discrete factual context. Nevertheless, the Court's decisions express the understanding that a plaintiff may be entitled to fees when the defendant takes post-complaint action "that affords the plaintiff all or some of the relief he sought" through "a change in conduct that redresses the plaintiff's grievances." *Hewitt*, 482 U.S. at 760-761. The Court's acceptance of that "settled" principle clearly contributed to the Court's ratio decidendi in *Hewitt*, and it informed the Court's decision in *Gwaltney*. Until this Court's decision in *Farrar* v. *Hobby*, *supra*, the Fourth Circuit, like all of the other courts of appeals, shared that understanding and applied it in specific cases. See, *e.g.*, *S-1 by and through P-1* v. *State Bd. of Educ.*, 6 F.3d 160, 164-165 (4th Cir. 1993), rev'd, 21 F.3d 49 (en banc), cert. denied, 513 U.S. 876 (1994); see also *Spencer* v. *General Elec. Co.*, 894 F.2d 651, 662 (4th Cir. 1990); *DeMier* v. *Gondles*, 676 F.2d 92, 93 (4th Cir. 1982); *Wooldridge* v. *Marlene Indus. Corp.*, 898 F.2d 1169, 1173-1174 (6th Cir. 1990), and cases cited at note 5, *supra*.

B. This Court's Decision In *Farrar* v. *Hobby* Does Not Repudiate The Principle That A Plaintiff May Recover Fees If The Defendant Voluntarily Provides Requested Relief

The Fourth Circuit stands alone among the courts of appeals in holding that this Court's decision in *Farrar* v. *Hobby*, 506 U.S. 103 (1992), precludes a plaintiff from qualifying as a "prevailing party" if the plaintiff's lawsuit induces the defendant to provide the requested relief voluntarily through a unilateral, post-complaint change in the defendant's conduct.[9] The Fourth Circuit's counter-intuitive holding rests on a misunderstanding of *Farrar*, which does not address that question. If anything, *Farrar* supports, rather than repudiates, the widely accepted principle that plaintiff may be a "prevailing party" if the plaintiff succeeds on its claims through means other than "an enforceable judgment, consent decree, or settlement" (*S-1 and S-2*, 21 F.3d at 51).

This Court's decision in *Farrar* addressed "whether a civil rights plaintiff who receives a nominal damages award is a 'prevailing party' eligible to receive attorney's fees under 42 U.S.C. § 1988." 506 U.S. at 105. Farrar had brought a civil rights suit against Hobby and other Texas officials under 42

[9] See, *e.g.*, *New Hampshire* v. *Adams*, 159 F.3d 680, 685 (1st Cir. 1998); *Marbley* v. *Bane*, 57 F.3d 224, 234 (2d Cir. 1995); *Baumgartner* v. *Harrisburg Housing Auth.*, 21 F.3d 541, 546-550 (3d Cir. 1994); *Craig* v. *Gregg County*, 988 F.2d 18, 21 (5th Cir. 1993); *Payne* v. *Board of Educ.*, 88 F.3d 392, 397 (6th Cir. 1996); *Zinn* v. *Shalala*, 35 F.3d 273, 274-275 (7th Cir. 1994); *Little Rock Sch. Dist.* v. *Pulaski County Special Sch. Dist. 1*, 17 F.3d 260, 262-263 & n.3 (8th Cir. 1994); *Kilgour* v. *City of Pasadena*, 53 F.3d 1007, 1010 (9th Cir. 1995); *Beard* v. *Teska*, 31 F.3d 942, 951-952 (10th Cir. 1994); *Morris* v. *City of West Palm Beach*, 194 F.3d 1203, 1207 (11th Cir. 1999); but see *Foreman* v. *Dallas County*, 193 F.3d 314, 320 (5th Cir. 1999) (stating, in dicta, that, after *Farrar*, "the continuing validity of the catalyst theory is in serious doubt"), cert. denied, 120 S. Ct. 1673 (2000).

U.S.C. 1983, seeking $17 million in compensation for an alleged violation of constitutional rights. 506 U.S. at 105-106. A jury found that Hobby had violated Farrar's rights, and the district court ultimately entered a judgment for nominal damages. *Id.* at 106-107. The district court awarded Farrar substantial attorney's fees, but the court of appeals reversed that award on the basis that Farrar was not a "prevailing party." *Id.* at 107-109. This Court determined that Farrar was a "prevailing party" for purposes of 42 U.S.C. 1988, but it affirmed the judgment on the ground that an award of any fees in that case was unreasonable. See 506 U.S. at 109-116.

In reaching its decision, the Court repeated its general formulation that "plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Farrar*, 506 U.S. at 109 (quoting *Hensley*, 461 U.S. at 433). The Court then reviewed its decisions in "three recent cases"—*Hewitt*, *Rhodes*, and *Texas Teachers Ass'n*—in which the Court had "elaborated on the definition of prevailing party." *Ibid.* As the Court noted, in each of those cases—as in the case before it—the plaintiff had litigated its claim to "judgment." *Id.* at 109 (*Hewitt*), 110 (*Rhodes*), 111 (*Texas Teachers Ass'n*). The Court distilled the following principles from those fully litigated cases:

> [T]o qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim. The plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought, *Hewitt*, *supra*, at 760, or comparable relief through a consent decree or settlement. *Maher* v. *Gagne*, 448 U.S. 122, 129 (1980). Whatever relief the plaintiff secures must directly benefit him at the time of the judgment or settlement. See *Hewitt*, *supra*, at 764. Otherwise the

> judgment or settlement cannot be said to "affec[t] the behavior of the defendant toward the plaintiff." *Rhodes*, *supra*, at 4. Only under these circumstances can civil rights litigation effect "the material alteration of the legal relationship of the parties" and thereby transform the plaintiff into a prevailing party. [*Texas Teachers Ass'n*], *supra*, at 792-793. In short, a plaintiff "prevails" when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.

Id. at 111-112. Applying that test, the Court concluded that a plaintiff who wins nominal damages is a prevailing party because "[a] judgment for damages in any amount, whether compensatory or nominal, modifies the defendant's behavior for the plaintiff's benefit by forcing the defendant to pay an amount of money he otherwise would not pay." *Id.* at 113.

The Fourth Circuit reasoned that, because the passages of *Farrar* quoted above do not indicate that a plaintiff may prevail through the defendant's voluntary cessation of the challenged conduct, the Court intended to foreclose that basis for an attorney's fee award. See *S-1 and S-2*, 21 F.3d at 51; *S-1 by and through P-1*, 6 F.3d at 168-169 (Wilkinson, J., dissenting) (opinion adopted by the en banc court). That reasoning is flawed at the threshold. The Court did not discuss the question of voluntary cessation because that issue was not before it. See *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 120 S. Ct. 693, 711 (2000) (noting that question whether a plaintiff may obtain fees based on the defendant's voluntary cessation of the challenged action "was not presented for this Court's decision in *Farrar*" and that "several Courts of Appeals have expressly concluded that *Farrar* did not repudiate [that] theory"). The Court's decision in *Farrar* accordingly cannot be viewed as having

decided that matter. See, *e.g.*, *Brecht* v. *Abrahamson*, 507 U.S. 619, 631 (1993); *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952); *Webster* v. *Fall*, 266 U.S. 507, 511 (1925).

Furthermore, the court of appeals had no basis for inferring from *Farrar* that a plaintiff can never obtain attorney's fees if the lawsuit induces voluntary compliance. *Farrar* resolved an attorney's fee dispute involving a *judgment*, and it did not repudiate, expressly or by implication, the Court's past observations that a plaintiff may "prevail," for purposes of an award of attorney's fees, if the plaintiff's lawsuit produces "a change in conduct that redresses the plaintiff's grievances." *Hewitt*, 482 U.S. at 760-761; see also *Gwaltney*, 484 U.S. at 67 n.6. The passages in *Farrar* that the court of appeals cited provide clear guidance for cases involving a judgment, which was the only factual context before the Court. Those passages, however, should not be mechanically applied to other contexts or employed without regard to this Court's statements respecting the availability of attorney's fees when a plaintiff obtains redress "despite the absence of a formal judgment in his favor." *Hewitt*, 482 U.S. at 761. See pp. 10-15, *supra*

Moreover, even if the Court decided to extend *Farrar*'s verbal formulation beyond the context of judgments, see 506 U.S. at 111-112, that formulation would support the conclusion that a plaintiff whose lawsuit induces voluntary post-complaint compliance is a "prevailing party." First, a plaintiff who obtains the objective of his suit through the defendant's voluntary post-complaint compliance receives "actual relief on the merits of his claim." *Farrar*, 506 U.S. at 111. Indeed, that plaintiff obtains far more meaningful redress—despite the absence of a formal judgment—than a party who receives nominal damages, like the plaintiff in *Farrar*. See *Hewitt*, 482 U.S. at 761. Second, that relief "materially alters the legal relationship between the par-

ties." *Farrar*, 506 U.S. at 111. The defendant who voluntarily complies with the plaintiff's demand for relief eliminates the basis for the plaintiff's legal challenge, moots the plaintiff's legal action, and relieves the parties of their obligation to litigate the suit. Plainly, the plaintiff is "able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant." *Texas Teachers Ass'n*, 489 U.S. at 792. Third, that change in the legal relationship "modif[ies] the defendant's behavior in a way that directly benefits the plaintiff." *Farrar*, 506 U.S. at 111-112. The plaintiff receives the actual relief it has requested. Furthermore, if the court determines that the defendant's actions have mooted the case, the plaintiff has received a benefit that is concrete and effectively permanent. See *Friends of the Earth*, 120 S. Ct. at 708 (a defendant is entitled to dismissal only if it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur") (quoting *United States* v. *Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968)); Pet. App. A13-A17.

In sum, *Farrar* supports, rather than undermines, the principle that a plaintiff may recover fees if the defendant voluntarily provides the requested relief. As we next show, the principle finds solid support in the language, legislative history, and purpose of the relevant federal legislation. The court of appeals' ruling does not.

C. The Court Of Appeals' Ruling Is Inconsistent With The Language, Legislative History, And Purposes Of Federal Legislation Authorizing Awards Of Attorney's Fees To Prevailing Parties

A plaintiff that has obtained the redress that it seeks through the defendant's voluntary compliance with the plaintiff's demand for relief is a "prevailing party" within the plain meaning of the FHAA, the ADA, and other attorney's fee statutes. The ordinary meaning of the verb "to prevail" is "to be or become effective or effectual; be successful." See, *e.g.*, *Webster's Third New International Dictionary* (1976) (def. 3). The Court has accordingly stated that a plaintiff has "prevailed" if he has "succeed[ed] on any significant issue in litigation which achieves some of the benefit [he] sought in bringing suit." *Farrar*, 506 U.S. at 109 (interpreting the term "prevailing party" in 42 U.S.C. 1988); *Texas Teachers Ass'n*, 489 U.S. at 791-792 (same); *Hensley*, 461 U.S. at 433 (same). A plaintiff whose lawsuit induces voluntary, post-complaint compliance plainly qualifies as a prevailing party under that standard because "because he has obtained the substance of what he sought." *Hewitt*, 482 U.S. at 761. See *ibid.* ("if the defendant, under pressure of the lawsuit, alters his conduct (or threatened conduct) towards the plaintiff that was the basis for the suit, the plaintiff will have prevailed").[10]

That construction is consistent with the legislative history of the FHAA and ADA attorney's fee provisions. The legislative reports that accompanied the FHAA and the ADA state that the term "prevailing party" has the same meaning in those statutes as in other civil rights laws, including 42

[10] The court of appeals' contrary ruling depends on a limitation—the requirement that the party obtain relief through "an enforceable judgment, consent decree, or settlement" (*S-1 and S-2*, 21 F.3d at 51)—that appears nowhere in the statutes at issue. See 42 U.S.C. 3613(c); 42 U.S.C. 12205. Furthermore, that limitation creates a stark anomaly: A plaintiff *may* "prevail" through an out-of-court settlement, where the plaintiff and the defendant agree to a compromise of the plaintiff's claims; but the plaintiff *cannot* "prevail" through the defendant's voluntary post-complaint compliance, where the defendant unilaterally capitulates to the plaintiff's request for relief. See *S-1 and S-2*, 21 F.3d at 51; cf. *Hewitt*, 482 U.S. at 760-761 (a plaintiff may prevail through "a monetary settlement *or* a change in conduct that redresses the plaintiff's grievances") (emphasis added).

U.S.C. 1988 (1994 & Supp. IV 1998). See note 3, *supra*. The House report accompanying 42 U.S.C. 1988 unambiguously states:

> A 'prevailing' party should not be penalized for seeking an out-of-court settlement, thus helping to lessen docket congestion. Similarly, after a complaint is filed, a defendant might voluntarily cease the unlawful practice. A court should still award fees even though it might conclude, as a matter of equity, that no formal relief, such as an injunction, is needed.

H.R. Rep. No. 1558, *supra*, at 7. The House and Senate reports cite numerous examples of such cases. See *ibid.*; S. Rep. No. 1011, *supra*, at 5.[11]

---

[11] The cited cases include the frequently followed decision, *Parham* v. *Southwestern Bell Tel. Co.*, 433 F.2d 421, 429-430 (8th Cir. 1970) (awarding fees despite the lack of need for equitable relief), as well as others. See *Kopet* v. *Esquire Realty Co.*, 523 F.2d 1005, 1007-1008 (2d Cir. 1975) (awarding fees under "common fund" doctrine and noting that fees may be awarded "even where adjudication on the merits is never reached, *e.g.*, after a settlement"); *Brown* v. *Gaston County Dyeing Mach. Co.*, 457 F.2d 1377, 1383 (4th Cir.) (awarding fees despite the lack of need for equitable relief), cert. denied, 409 U.S. 982 (1972); *Thomas* v. *Honeybrook Mines, Inc.*, 428 F.2d 981, 986 (3d Cir. 1970) (awarding fees under "common fund" doctrine where plaintiff's lawsuit caused defendants to take the action requested in the lawsuit), cert. denied, 401 U.S. 911 (1971); *Richards* v. *Griffith Rubber Mills*, 300 F. Supp. 338 (D. Or. 1969) (awarding fees even though injunctive relief was made inappropriate by, among other things, the fact that the defendant had provided the plaintiff the job assignment she requested). The cases cited in the legislative reports are merely illustrative of decisions from that era. See also, *e.g.*, *Peltier* v. *City of Fargo*, 533 F.2d 374, 380 (8th Cir. 1976) (denial of equitable relief); *Rice* v. *Gates Rubber Co.*, 521 F.2d 782, 785 (6th Cir. 1975) (same); *Barnett* v. *W.T. Grant Co.*, 518 F.2d 543, 550 (4th Cir. 1975) (same); *Evans* v. *Sheraton Park Hotel*, 503 F.2d 177, 189 (D.C. Cir. 1974) (same); see also *Ramey* v. *Cincinnati Enquirer, Inc.*, 508 F.2d 1188, 1196 (6th Cir. 1974) (derivative suit mooted by defendant's voluntary compliance with plaintiff's demands), cert. denied, 422 U.S. 1048 (1975); *Kahan* v. *Rosenstiel*, 424 F.2d 161, (3d Cir.) (same), cert. denied, 398 U.S. 950 (1970).

That interpretation is also consistent with the central purpose of federal fee-shifting statutes. Congress sought to ensure that persons who have legitimate civil rights grievances have effective access to the judicial process, *Hensley*, 461 U.S. at 429, and can participate in the vindication of important civil rights principles, *Newman* v. *Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968). See *Kay* v. *Ehrler*, 499 U.S. 432, 436 n.2 (1991) ("If private citizens are to be able to assert their civil rights, . . . then citizens must have the opportunity to recover what it costs them to vindicate these rights in court." (quoting S. Rep. No. 1011, *supra*, at 2)). Congress had no reason to deny the benefits of those statutes to the plaintiff that brings a meritorious suit and induces compliance without formal judgment.

A plaintiff whose lawsuit induces voluntary and unilateral compliance with the civil rights laws has no less need or entitlement to recover attorney's fees than the plaintiff who achieves that objective by litigating to judgment or by reaching an out-of-court settlement. With respect to need, a plaintiff will likely require costly professional services to bring a meritorious lawsuit, regardless of whether that suit is ultimately resolved by judgment, settlement, or voluntary compliance. And with respect to entitlement, Congress surely sought to encourage plaintiffs to bring suit in the *most* meritorious cases, where the defendant stands in clear violation of the law. Those are precisely the cases in which a plaintiff's suit is likely to induce voluntary compliance. Indeed, the court of appeals' rule would have the perverse effect of selectively denying plaintiffs fees in precisely those

situations in which a lawsuit promptly and effectively induces compliance with the law.[12]

Furthermore, the court of appeals' categorical rule that a plaintiff cannot obtain attorney's fees if the plaintiff's suit is mooted by the defendant's voluntary compliance would affirmatively discourage plaintiffs from bringing meritorious claims for fear that the defendant could take unilateral action, at any time before judgment, that would extinguish the plaintiff's right to receive otherwise recoverable litigation expenses. A plaintiff considering a suit for equitable relief may be understandably deterred from vindicating its rights by the prospect that the defendant can freely terminate the action through voluntary compliance and leave the plaintiff to bear all the costs of the litigation, even if the plaintiff clearly would have prevailed had the case proceeded to judgment. That deterrent effect is greatest for cases that are expensive to litigate and lack any prospect of a large damage award for financing the litigation, such as many meritorious civil rights cases. See *City of Riverside* v. *Rivera*, 477 U.S. 561, 577 (1986) (plurality opinion) ("Congress enacted § 1988 specifically to enable plaintiffs to enforce the civil rights laws even where the amount of

[12] The court of appeals' contrary rule is also anomalous in light of the legal profession's role in the resolution of disputes. Parties in litigation are normally interested in achieving some tangible result, see *Hewitt*, 482 U.S. at 760-761, but they must rely on their attorneys' advice in determining the best means to the desired end. See generally ABA Model Rules of Professional Conduct, *reprinted in ABA/BNA Lawyers' Manual on Professional Conduct* (2000). Congress surely did not intend to deny a plaintiff a fee award in those situations in which the attorney has accomplished what the plaintiff, the judiciary, and the public should view as the most efficacious result—the resolution of a meritorious lawsuit, and the achievement of the plaintiff's desired outcome, through the defendant's voluntary action.

damages at stake would not otherwise make it feasible for them to do so.").[13]

The court of appeals' rule may also encourage some defendants to disregard the law unless and until they are sued, particularly where private enforcement under the law is limited to suits for injunctive relief. For example, under the court of appeals' approach, a business that is obligated under the ADA to make its facility accessible to those with disabilities may well conclude that it is cost-effective to disregard the law until sued and then make the required accommodations to moot the case. Indeed, that business may be justified in concluding that a lawsuit will never materialize in light of the low probability that disabled citizens injured by that violation of the ADA would undertake the risk of financing an easily mooted lawsuit. See *Riverside*, 477 U.S. at 577-578 ("Fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain.") (quoting S. Rep. No. 1011, *supra*, at 2).

Finally, the court of appeals' rule could encourage the litigants to engage in strategic behavior directed at the avail-

[13] A number of important civil rights statutes allow only injunctive relief. See, *e.g.*, 42 U.S.C. 12188(a) (public accommodations provisions of the ADA); 42 U.S.C. 2000a-3 (Title II of the Civil Rights Act of 1964); see also H.R. Rep. No. 1558, *supra*, at 9 ("[I]n a large number of cases brought under the provisions covered by [Section 1988], only injunctive relief is sought."). Additionally, even where damages are available, "it should be observed that, in some cases, immunity doctrines and special defenses, available only to public officials, preclude or severely limit the damage remedy." See *ibid.* For example, a plaintiff may bring an age discrimination action against a public official under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), but the plaintiff is entitled to only equitable relief. See *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62 (2000); *Alden* v. *Maine*, 527 U.S. 706, 755-757 (1999).

ability of attorney's fees rather than the merits of the case. The court's rule could encourage plaintiffs to include claims for damages, even when they would otherwise be satisfied with injunctive relief, to make the case more difficult to moot. See, *e.g.*, *University of Tex.* v. *Camenisch*, 451 U.S. 390, 393-394 (1981) (claim for damages prevented mootness). Similarly, the rule could encourage plaintiffs to expand the number of litigants or bring class-action claims to make the claim more difficult to moot. See, *e.g.*, *Sosna* v. *Iowa*, 419 U.S. 393, 399-402 (1975) (class action claims prevented mootness). At the same time, the court of appeals' rule could give defendants a strong incentive to coerce the plaintiff, through protracted litigation, to settle a meritorious claim on unfavorable terms, with provision for attorney's fees, rather than run the risk that the defendant will comply without settlement and moot the case. Congress plainly did not intend to draw distinctions between settlement and voluntary compliance that would skew the litigants' incentives in this way and produce unwarranted results.

D. This Court Should Remand The Case For A Determination Of Whether, Under The Facts Of This Case, An Award Of Fees Is Appropriate

The Court should reverse the court of appeals' ruling that a plaintiff can qualify as a "prevailing party" only through a "judgment, decree, or settlement" (Pet. App. A8). There is no occasion, however, for the Court to resolve the question whether an award of attorney's fees is warranted under the fact of this case. Neither the court of appeals nor the district court reached that question. See *id.* at A7-A8, A17-A18. Furthermore, petitioners acknowledge that the Court should remand the case so that the district court can "make appropriate findings of fact and conclusions of law" on petitioners' motion for attorney's fees. Pet. 27. In making those determinations, the district court should be guided by

several principles that can readily be discerned from the decisions of this Court and the courts of appeals.

First, a plaintiff that claims that its lawsuit induced voluntary compliance is entitled to an award of attorney's fees only if that suit had legal merit. "It is clear beyond peradventure that unless an action brought by a private litigant contains some basis in law for the benefits ultimately received by that litigant, the litigant cannot be said to have 'enforced' the civil rights laws or to have promoted their policies for the benefit of the public at large." *Long* v. *Bonnes*, cert. denied, 455 U.S. 961, 966-967 (1982) (Rehnquist, J., dissenting from denial of certiorari).[14] The district court need not determine that the plaintiff would have prevailed had the plaintiff litigated the suit to judgment. See *id.* at 966 n.3.[15] Rather, the court should determine whether the plaintiff's complaint had sufficient merit to withstand a motion to dismiss for lack of jurisdiction or failure to state a claim on which relief may be granted. See Fed. R. Civ. P. 12(b). The standards for dismissal on those grounds are familiar, are relatively easy to apply, and ensure that the plaintiff's claims are within the jurisdiction of the court and grounded in law.[16]

---

[14] See, *e.g.*, *Zinn* v. *Shalala*, 35 F.3d at 274 ("the plaintiffs' claims, if pressed, cannot have been frivolous, unreasonable, or groundless" (quoting *Stewart* v. *McGinnis*, 5 F.3d 1031, 1039 (7th Cir. 1993), cert. denied, 510 U.S. 1121 (1994)); *Little Rock Sch. Dist.* v. *Pulaski County Special Sch. Dist. 1*, 17 F.3d at 262 (same); *Pembroke* v. *Wood County*, 981 F.2d. 225, 230-231 (5th Cir.) (same), cert. denied, 508 U.S. 973 (1993); *Nadeau* v. *Helgemoe*, 581 F.2d at 279 (same); see also *Hennigan* v. *Ouachita Parish Sch. Bd.*, 749 F.2d at 1153 (the plaintiff's lawsuit "lacked colorable merit").

[15] That approach would effectively require the parties to litigate the mooted claims. See *Hensley*, 461 U.S. at 437 ("A request for attorney's fees should not result in a second major litigation.").

[16] See, *e.g.*, *Hishon* v. *King & Spalding*, 467 U.S. 69, 73 (1984) (a motion to dismiss may be granted "only if it is clear that no relief could be

Second, the plaintiff must be able to demonstrate that it obtained redress of a grievance that motivated the suit. See *Hewitt*, 482 U.S. at 760-761 (the defendant's actions must "afford[] the plaintiff all or some of the relief he sought through a judgment—*e.g.*, a monetary settlement or a change in conduct that redresses the plaintiff's grievances"). The Court suggested in *Hewitt* that the plaintiff needs to show that the complaint encompassed the relief that the defendant provided and that the plaintiff personally benefitted from the defendant's actions. See *id.* at 763; see also *Rhodes*, 488 U.S. at 4. At a minimum, the plaintiff must have received "some of the benefit sought in the lawsuit, even though the plaintiff does not ultimately succeed in securing a favorable judgment." *Baumgartner* v. *Harrisburg Hous. Auth.*, 21 F.3d 541, 546 (3d Cir. 1994) (quoting *Wheeler* v. *Towanda Area Sch. Dist.*, 950 F.2d 128, 131 (3d Cir. 1991)).

Third, the plaintiff must demonstrate "a clear causal link" between the plaintiff's suit and the defendant's actions. *Hewitt*, 482 U.S. at 763. See, *e.g.*, *Baumgartner*, 21 F.3d at 546 (the plaintiff must show "a causal connection between the litigation and the relief from the defendant" (quoting *Wheeler*, 950 F.2d at 131)); *Foremaster* v. *City of St. George*, 882 F.2d 1485, 1488 (10th Cir. 1989) (same), cert. denied, 495 U.S. 910 (1990). In a situation in which the defendant has undertaken voluntary action, the court's analysis of the defendant's motivations will likely depend on a highly factbound inquiry and may turn on reasonable inferences from the nature and timing of the defendant's change in conduct. At bottom, the plaintiff must be able to show that the lawsuit, as a matter of fact, played a substantial role in

granted under any set of facts that could be proved consistent with the allegations"). See also Note, *Civil Rights Attorney's Fees Awards in Moot Cases*, 49 U. Chi. L. Rev. 819, 837-838 (1982).

inducing the defendant to change its ways. See *Marbley* v. *Bane*, 57 F.3d 224, 234 (2d Cir. 1995).[17]

[17] Where the defendant is a governmental entity and the plaintiff asserts that its lawsuit prompted a governmental change in policy, the plaintiff may confront particular problems of proof because the government acts through collective consensus and may elect to change laws and regulations for policy reasons unrelated to pending litigation. The legislative and regulatory history of laws and regulations often provides guidance in determining the basis for statutory and regulatory amendments. Compare *Paris* v. *United States Dep't of Hous. & Urban Dev.*, 988 F.2d 236, 241 (1st Cir. 1993) (Where legislative history makes clear that the plaintiff's individual suit prompted a statutory amendment, the lawsuit may be "fairly characterized as a catalyst of Congress' amendment."), with *Milton* v. *Shalala*, 17 F.3d 812, 815 (5th Cir. 1994) ("The mere possibility that Congress acted because of an individual claimant's suit (or reacted to a large number of similar suits) is too speculative in our view considering the many influences upon members of Congress in casting their votes."), and *Truax* v. *Bowen*, 842 F.2d 995, 997 (8th Cir. 1988) (Where enactment of reform legislation was partly the result of thousands of lawsuits, "the causal link between [the [plaintiff's] lawsuit and Congress's action is too tenuous to satisfy the calalyst test."); see also *Hendricks* v. *Bowen*, 847 F.2d 1255, 1259 (7th Cir. 1988) (Easterbrook, J. concurring) (A plaintiff is not entitled to attorney's fees if it is merely the "fortuitous beneficiary" of new legal standards.).

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further proceedings.

SETH P. WAXMAN
Solicitor General

BILL LANN LEE
Assistant Attorney General

BARBARA D. UNDERWOOD
Deputy Solicitor General

JEFFREY P. MINEAR
Assistant to the Solicitor General

JESSICA DUNSAY SILVER
KEVIN K. RUSSELL
Attorneys

NOVEMBER 2000

(4)

No. 99-1848

Supreme Court, U.S.
FILED
NOV 13
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

NOV 13 2000

BUCKHANNON BOARD AND CARE HOME, INC; THE WEST VIRGINIA RESIDENTIAL BOARD AND CARE HOME ASSOCIATION; DORSEY PIERCE; and on behalf of all others similarly situated,

Petitioners,

v.

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF OF FRIENDS OF THE EARTH, SIERRA CLUB, CITIZENS LOCAL ENVIRONMENTAL ACTION NETWORK, and AMERICAN CANOE ASSOCIATION, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Bruce J. Terris (*Counsel of Record*)
Carolyn Smith Pravlik
Sarah A. Adams
TERRIS, PRAVLIK & MILLIAN, LLP
1121 12th Street, N.W.
Washington, D.C. 20005
(202) 682-2100

Counsel for Amici Curiae

3 pp

TABLE OF CONTENTS

Page

INTEREST OF AMICI 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. DECISIONS OF THE COURT DIRECTLY SUPPORT THE APPLICABILITY OF THE CATALYST RULE 4

II. THE LEGISLATIVE HISTORY OF SEVERAL FEE-SHIFTING STATUTES SUPPORTS THE APPLICABILITY OF THE CATALYST RULE ... 13

III. PUBLIC POLICY SUPPORTS THE APPLICABILITY OF THE CATALYST RULE .. 15

IV. THE CASE SHOULD BE REMANDED BACK TO THE DISTRICT COURT TO ADDRESS THE FACTUAL ISSUE OF WHETHER PETITIONERS HAVE SATISFIED THE REQUIREMENTS OF THE CATALYST RULE 20

CONCLUSION 21

APPENDIX

Brief for the United States Amicus Curiae Supporting Petitioners 1a

TABLE OF CASES AND AUTHORITIES

Cases **Page**

American Council of the Blind v. Romer, 992 F.2d 249 (10th Cir.), certiorari denied, 510 U.S. 864 (1993) 11
Baumgartner v. Harrisburg Housing Authority, 21 F.3d 541 (3d Cir. 1994) 8, 10, 18
Beard v. Teska, 31 F.3d 942 (10th Cir. 1994) 11
Board of Education of Downers Grove Grade Sch. District No. 58 v. Steven L., 89 F.3d 464 (7th Cir. 1996), certiorari denied, 520 U.S. 1198 (1997) . 10
Citizens Against Tax Waste v. Westerville City Sch., 985 F.2d 255 (6th Cir. 1993) 10
Craig v. Gregg County, Texas, 988 F.2d 18 (5th Cir. 1993) 10
Evans v. Jeff D., 475 U.S. 717 (1986) 16
Friends of the Earth v. Laidlaw Environmental Services (TOC),Inc., 528 U.S. 167, 120 S.Ct. 693 (2000) ... *passim*
Farrar v. Hobby, 506 U.S. 103 (1992) ..... *passim*
Gwaltney v. Smithfield, Ltd. v. Chesapeake Bay Foundation, 484 U.S. 49 (1987) 2, 6
Hanrahan v. Hampton, 446 U.S. 754 (1980) 2, 4, 7
Hewitt v. Helms, 482 U.S. 755 (1987) 2, 5, 7, 9
Institutionalized Juveniles v. Secretary of Public Welfare, 758 F.2d 897 (3d Cir. 1985) 12
Kilgour v. City of Pasadena, 53 F.3d 1007 (9th Cir. 1995) 10
Laidlaw v. Friends of the Earth, 149 F.3d 303 (4th Cir. 1998) 6
Little Rock Sch. District v. Pulaski County Special Sch. District, #1, 17 F.3d 260 (8th Cir. 1994) 10
Maduka v. Meissner, 114 F.3d 1240 (D.C. Cir. 1997) ... 11
Maher v. Gagne, 448 U.S. 122 (1980) 2, 4, 5, 7

Marbley v. Bane, 57 F.3d 224 (2d Cir. 1995) 10
Marek v. Chesney, 473 U.S. 1 (1985) 4
Morris v. City of West Palm Beach, 194 F.3d 1203 (11th Cir. 1999) 10, 11, 18
Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968) 16
Paris v. U.S. Department of Housing and Urban Development, 988 F.2d 236 (1st Cir. 1993) 9, 12
Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546 (1986) 6
Rhodes v. Stewart, 488 U.S. 1 (1988) 9
S-1 & S-2 v. State Board of Education, 21 F.3d 49 (4th Cir.), certiorari denied, 513 U.S. 876 (1994) 1, 7, 8, 20
Student Public Interest Research Group of New Jersey v. AT&T Bell Laboratories, 842 F.2d 1436 (3d Cir. 1988) 16
Zinn by Blankenship v. Shalala, 35 F.3d 273 (7th Cir. 1994) 8, 10

STATUTES

28 U.S.C. 2412 ..... 14, 16
33 U.S.C. 1365 ..... 2, 6, 13
42 U.S.C. 1988 ..... 4, 13
42 U.S.C. 3601 1
42 U.S.C. 6972 2
42 U.S.C. 7604 ..... 2, 13
42 U.S.C. 12132 1
42 U.S.C. 12182 1

LEGISLATIVE HISTORY

S. Rep. No. 50, 99th Cong., 1st Sess. (1985) 6

S. Rep. No. 233, 98th Cong., 1st Sess. (1983) 6
S. Rep. No. 414, 92d Cong., 1st Sess. (1971) 6, 13, 16
S. Rep. No. 1011, 94th Cong., 2d Sess. (1976) .. 3, 5, 13, 15
S. Rep. No. 1196, 91st Cong., 2d Sess. (1970) 13
H.R. Rep. No. 1418, 96th Cong., 2d Sess. (1980) 14, 16
H.R. Rep. No. 1558, 94th Cong., 2d Sess. (1976) 14

INTEREST OF AMICI [1/]

This is an action brought under the Fair Housing Amendments Act of 1988, 42 U.S.C. 3601, *et seq*., and Titles II and III of the Americans with Disabilities Act of 1990, 42 U.S.C. 12132 and 12182, challenging self-preservation regulations of the respondents. These regulations required that all residents of Residential Board and Care Homes be capable of evacuating the home, without prompting, in the event of an imminent danger. The action became moot when the West Virginia legislature repealed the self-preservation regulations at issue. Petitioners filed a request for attorneys' fees under the "catalyst rule,"[2/] which was denied based on the Court of Appeals for the Fourth Circuit's *en banc* decision in *S-1 & S-2 v. State Board of Education*, 21 F.3d 49 (4th Cir.), certiorari denied, 513 U.S. 876 (1994).

Petitioners argue that even though they did not receive a judicial judgment they are entitled to attorneys' fees if they are found to be the "catalyst" that led the West Virginia legislature to take the action to repeal the regulations that they challenged. Numerous courts of appeals have recognized this theory as a basis for plaintiffs to obtain attorneys' fees in cases under fee- shifting statutes when a defendants' voluntary action gives the plaintiffs the remedy they sought prior to a judgment or a settlement. However, the Court of Appeals for the Fourth Circuit has interpreted a ruling of this Court, *Farrar v. Hobby*, 506 U.S. 103 (1992),

---

[1/] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party has authored this brief in whole or in part, and that no person or entity other than *amici* and their counsel has made a monetary contribution to the preparation or submission of this brief.

[2/] The petitioners also sought attorneys' fees under the bad faith exception to the American Rule. The district court denied this request, finding that the defendants had not acted in bad faith. Petitioners did not appeal this ruling.

to hold that this theory for recovery of attorneys' fees no longer exists.

Most of the federal environmental laws enacted since 1970 have citizen suit provisions. *See, e.g.*, Clean Air Act, 42 U.S.C. 7604; Clean Water Act, 33 U.S.C. 1365; Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6972. Since the enactment of citizen suit provisions, the fee-shifting provisions in these statutes have been the basis for bringing thousands of environmental cases. *Amici* are public interest environmental organizations who have brought many of these cases and they intend to bring similar cases in the future. *Amici* include the petitioners in *Friends of the Earth v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S.167, 120 S. Ct. 693 (2000), where this Court granted certiorari on the very same issue but did not resolve it in its decision. Since the *Laidlaw* case is still pending, and since *amici* continue to litigate similar environmental cases, this issue is of great importance to them.

SUMMARY OF ARGUMENT

1. This Court has repeatedly stated that plaintiffs who obtain relief under fee-shifting statutes because of the actions of the defendant without a judgment or settlement are entitled to attorneys' fees. *Hanrahan v. Hampton*, 446 U.S. 754 (1980); *Maher v. Gagne*, 448 U.S. 122 (1980); *Hewitt v. Helms*, 482 U.S. 755 (1987); *Gwaltney v. Smithfield, Ltd. v. Chesapeake Bay Foundation*, 484 U.S. 49 (1987). In *Hewitt*, the Court stated that, "[i]t is settled law, of course, that relief need not be judicially decreed in order to justify a fee award * * *." *Id.* at 760.

The Court below held that *Farrar v. Hobby*, 506 U.S.

103 (1992), overruled the catalyst rule. In *Farrar*, this Court stated that the "plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought or comparable relief through a consent decree or settlement." *Id.* at 111. However, the Court gave no indication that it was overruling its earlier decisions. On the contrary, it cited and relied on its earlier decisions. Subsequently, in *Friends of the Earth v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 120 S. Ct. 693, 711 (2000), the Court expressly stated that the catalyst rule "was not presented for this Court's decision in *Farrar*." All the other courts of appeals which have considered the effect of *Farrar* on the catalyst rule have held that the catalyst rule continues to apply.

2. Congress has made clear in the legislative history of several fee-shifting statutes that plaintiffs can obtain attorneys' fees under the catalyst rule. Thus, the Senate Report concerning the Civil Rights Attorney's Fees Awards Act of 1976, stated that, "for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or *without formally obtaining relief*" (emphasis added). S. Rep. No. 1011, 94th Cong., 2d Sess. 5 (1976).

3. The abolition of the catalyst rule would seriously undermine Congress' intent in passing fee-shifting statutes to encourage litigation to enforce these statutes. Plaintiffs' attorneys are accustomed to evaluating the strengths of their cases before bringing litigation to determine their likelihood of success. Therefore, plaintiffs' attorneys can choose to take the risk that the courts will decide against them and therefore no fees will be paid them. However, it is entirely a different matter for fees to be denied because plaintiffs'

arguments are so strong that the defendant provides the relief without even the need for a judgment. Litigants will have great difficulty in obtaining counsel if attorneys can be denied fees precisely because of the success of the litigation. This is particularly true if this can occur after the litigation has run for years and the attorneys have expended a large number of hours of work and incurred substantial expenses.

ARGUMENT

The question before this Court is a relatively simple one that has been addressed many times by numerous federal courts under the more than 100 fee-shifting statutes found in federal law. *See Marek v. Chesney*, 473 U.S. 1, 43-51 (1985) (appendix listing federal statutes authorizing the award of attorney's fees). The issue is whether a plaintiff is a "prevailing party" where it has obtained a favorable result not through a judgment of the court or a settlement but because the defendant takes action, at least in part, because of the litigation. This issue is what is commonly referred to as the "catalyst rule" or "catalyst theory."

I

DECISIONS OF THE COURT DIRECTLY SUPPORT THE APPLICABILITY OF THE CATALYST RULE

This Court has addressed this question on numerous occasions. In *Hanrahan v. Hampton*, 446 U.S. 754, 756-757 (1980), the Court held that civil rights plaintiffs who had prevailed on appeal and thereby won the right to a new trial but had not yet received any relief from the district court were not "prevailing parties" under 42 U.S.C 1988 for the purpose of obtaining attorneys' fees. However, the Court, after reviewing the legislative history of 42 U.S.C. 1988, explained that "a person may in some circumstances be a

'prevailing party' without having obtained a favorable 'final judgment following a full trial on the merits.'"

The Court further articulated the catalyst rule in *Maher v. Gagne*, 448 U.S. 122, 129 (1980). In holding that a settlement was adequate to confer prevailing party status, the Court quoted a Senate report that stated that, "for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights * * * without formally obtaining relief." *See* S. Rep. No. 1011, 94th Cong., 2d Sess. 5 (1976).

Later, in *Hewitt v. Helms*, 482 U.S. 755, 760-761 (1987), this Court, in addressing the definition of a prevailing party, issued its clearest statement of the catalyst rule:

> It is settled law, of course, that relief need not be judicially decreed in order to justify a fee award under § 1988. A lawsuit sometimes produces voluntary action by the defendant that affords the plaintiff all or some of the relief he sought through a judgment - *e.g.*, * * * a change in conduct that redresses the plaintiff's grievances. When that occurs, the plaintiff is deemed to have prevailed despite the absence of a formal judgment in his favor. *See Maher*, *supra*, 448 U.S., at 129 * * *.

The Court went on to say that "in a declaratory judgment action: if the defendant, under pressure of the lawsuit, alters his conduct (or threatened conduct) towards the plaintiff that was the basis for the suit, the plaintiff will have prevailed. *That* is the proper equivalent of a judicial judgment which would produce the same effect * * *" (emphasis in original).

Id. at 761.[3/]

This Court again addressed this issue in *Gwaltney v. Smithfield, Ltd. v. Chesapeake Bay Foundation*, 484 U.S. 49, 67, n. 6 (1987):[4/]

> Under the Act, plaintiffs are also protected from the suddenly repentant defendant by the authority of the district courts to award litigation costs "whenever the court determines such award is appropriate." 33 U.S.C. 1365(d). The legislative history of this provision states explicitly that the award of costs "should extend to plaintiffs in actions which result in successful abatement but do not reach a verdict. For instance, if as a result of a citizen proceeding and before a verdict is issued, a defendant abated a violation, the court may award litigation expenses borne by the plaintiffs in prosecuting such actions." S. Rep. No. 414, p. 81 (1971), 2 Leg. Hist. 1499.[5/]

[3/] The plaintiff in *Hewitt* was denied fees because the changes in prison policies did not benefit him since he was no longer in custody. 482 U.S. at 763. However, here, since plaintiffs continue to operate and reside in the residential care facilities, they benefit from the amended regulation. In any event, the question before this Court is whether plaintiffs *can* be prevailing parties without having obtained an enforceable judgment or settlement, not whether they actually are prevailing parties. The issue of whether plaintiffs can satisfy the requirements of the catalyst rule is properly a question for the district court in the first instance on remand. *See Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S.167, 120 S. Ct. 693, 712 (2000).

[4/] In *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 559-560 (1986), the Court stated that the principles to be followed in awarding attorneys' fees and expenses are the same for environmental and civil rights cases.

[5/] In *Laidlaw v. Friends of the Earth*, 149 F.3d 303 (4th Cir. 1998), the Court of Appeals for the Fourth Circuit indicated that it believed that this statement was erroneous because the *Gwaltney* decision discussed the prior

In short, prior to *Farrar*, according to this Court, it was "settled law" that a plaintiff has prevailed for the purposes of fees when, in the absence of a court order or a settlement, a voluntary change in a defendant's conduct as a result of a lawsuit has provided relief. *Hewitt v. Helms, supra*, 482 U.S. at 760-761.

In *S-1 & S-2 v. State Board of Education*, upon which the decision of the court of appeals in this case was based, the Court of Appeals for the Fourth Circuit held that this Court's decision in *Farrar* overruled the catalyst rule. In *Farrar*, the Court considered the issue of "whether a civil rights plaintiff who receives a nominal damages award is a 'prevailing party' eligible to receive attorney's fees under 42 U.S.C. § 1988." 506 U.S. at 105. The Court said that, "to qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim." *Id.* at 111.[6/] However, the Court went on to say (*ibid.*):

---

language of Section 505(d) of the Clean Water Act which authorized a court to award fees to any "party," rather than the language of the 1987 amendment to that Section which added "prevailing or substantially prevailing" before "party." *Id.* at 307, n. 5. However, this Court's statement in *Gwaltney* was not erroneous. The legislative history of the 1987 amendment to Section 505(d) shows that the change in the language of that Section was intended merely to clarify Congress' intent that citizen plaintiffs not receive attorneys' fee awards when the plaintiffs had lost the litigation. S. Rep. No. 50, 99th Cong., 1st Sess. 33 (1985); S. Rep. No. 233, 98th Cong., 1st Sess. 24-25 (1983); A Legislative History of the Water Quality Act of 1987, 100th Cong., 2d Sess., Sen. Print 144 (Nov. 1988), vol. 2, pp. 1311-1312 (remarks of Senator Chafee, the sponsor of the legislation). Since the "prevailing party" language is precisely the language interpreted by the Court in *Hanrahan v. Hampton*, *Maher v. Gagne*, and *Hewitt v. Helms*, the addition of that language cannot possibly mean that the catalyst rule no longer applies to fee awards under Section 505(d).

[6/] The Court found that an award of nominal damages was sufficient to make the plaintiff a prevailing party. However, it held that since a

> The plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought, *Hewitt, supra,* 482 U.S., at 760, or comparable relief through a consent decree or settlement, *Maher v. Gagne*, 448 U.S. 122, 129. Whatever relief the plaintiff secures must directly benefit him at the time of the judgment or settlement. See *Hewitt, supra,* 482 U.S. at 764. Otherwise the judgment or settlement cannot be said to "affec[t] the behavior of the defendant toward the plaintiff." [citation omitted] Only under these circumstances can civil rights litigation effect "the material alteration of the legal relationship of the parties" and thereby transform the plaintiff into a prevailing party. [citation omitted]

The Court of Appeals for the Fourth Circuit held in *S-1 & S-2* that the language, "plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought or comparable relief through a consent decree or settlement," overruled the catalyst rule because it did not add *or voluntary action by the defendant* at the end of the sentence. 6 F.3d at 168 (dissenting opinion adopted by majority *en banc*). However, *Farrar* was not addressing the situation where a defendant had voluntarily changed its behavior in response to a lawsuit. Instead, it was discussing the nature of the relief that a plaintiff who had obtained a judgment must receive in order to be a prevailing party for fees purposes.

The Court of Appeals for the Fourth Circuit held that *Farrar* overruled the catalyst rule even though *Farrar* did not state that it was doing so. As the Court of Appeals for

---

prevailing party is only entitled to reasonable fees, the denial of fees was appropriate when the plaintiff had obtained no significant relief. 506 U.S. at 115.

the Seventh Circuit stated in *Zinn by Blankenship v. Shalala*, 35 F.3d 273, 276 (1994), it is "implausible that the Supreme Court meant to abolish a rule employed by nearly every circuit and previously recognized by the Court itself as 'settled law,' without expressly indicating that it was doing so." Similarly, in *Baumgartner v. Harrisburg Housing Auth.*, 21 F.3d 541, 547 (3d Cir. 1994), the Court of Appeals for the Third Circuit stated that "[w]e believe it is not likely that the Supreme Court [in *Farrar*] would overturn such a wide-spread theory without even mentioning it, particularly when it was inapplicable to the case at hand." It is particularly doubtful that the Court was overruling its earlier decisions when it explicitly cited and relied on them.

In the case below, the court of appeals stated that, "[b]ecause the plaintiffs did not bring about the change in West Virginia law through any judgment, decree, or settlement," they are not prevailing parties. Appendix to Petitioners' Petition for Writ of Certiorari (hereafter "Pet. App."), p. A8. However, when, as here, the defendants modify their behavior in response to litigation (by no longer forcing the residential facility plaintiffs to close or the individual plaintiffs to move out of their homes), the lawsuit has affected the behavior of the defendant toward the plaintiff exactly as *Farrar* requires. Indeed, the Court made clear in *Farrar* that it is not a judgment itself that confers prevailing party status but a change in behavior by the defendant or a change in the legal relationship between the plaintiff and the defendant. *See* 506 U.S. at 111. Similarly, in *Hewitt*, this Court stated that "[a]t the end of the rainbow lies not a judgment, but some action (or cessation of action) by the defendant that the judgment produces–the payment of damages, or some specific performance, or the termination of some conduct." 482 U.S. at 761. Accord, *Rhodes v. Stewart*, 488 U.S. 1, 4 (1988) (a party who wins a declaratory

judgment prevails for fees purposes only if the judgment "affects the behavior of the defendant toward the plaintiff"). Thus, the *sine qua non* of prevailing party status is not a judgment but a change in behavior by the defendant brought on by the lawsuit. This change of behavior is exactly the situation covered by the catalyst rule.

Ten other Circuits have found, either explicitly or implicitly, that the catalyst rule was not overruled by *Farrar*. *Paris v. U.S. Department of Housing and Urban Development*, 988 F.2d 236, 240-241 (1st Cir. 1993) (finding plaintiff to be catalyst and remanding the case to the district court for a decision on the amount of fees); *Marbley v. Bane*, 57 F.3d 224, 234 (2d Cir. 1995)("*Farrar* does not eviscerate the long-standing doctrine that a plaintiff who has obtained at least some part of what he sought in bringing the suit may be considered a prevailing party"); *Baumgartner v. Harrisburg Housing Auth.*, *supra*, 21 F.3d at 546-551 (3d Cir. 1994) (quoted at p. 8-9 above); *Craig v. Gregg County, Texas*, 988 F.2d 18, 20-21 (5th Cir. 1993)("A more precise reading of *Farrar*, however, might suggest that a party may prevail, even in the absence of a judgment, consent decree, or direct personal benefit 'if its ends are accomplished as a result of the litigation'" (citation omitted)); *Citizens Against Tax Waste v. Westerville City Sch.*, 985 F.2d 255, 257-258 (6th Cir. 1993) (holding parties to be prevailing party under the catalyst rule because "it is not necessary that a party actually receive some form of judicially ordered relief" in order to be a prevailing party under §1988); *Zinn by Blankenship v. Shalala, supra*, 35 F.3d at 274-276 (quoted at p. 8 above);[7/] *Little Rock Sch. Dist. v. Pulaski County Special*

[7/] The Eleventh Circuit in a footnote in *Morris v. City of West Palm Beach*, 194 F.3d 1203, 1206-1207, n. 5 (11th Cir. 1999), stated that *Board of Educ. of Downers Grove Grade Sch. Dist. No. 58 v. Steven L.*, 89 F.3d 464 (7th Cir. 1996), certiorari denied, 520 U.S. 1198 (1997) in an opinion written by the dissenting judge in *Zinn by Blankenship v. Shalala*, called into question the continued viability of the catalyst rule in the Seventh Circuit. *Amici* disagree with this statement. The court in *Steven L.* held that plaintiffs received only interim relief "for which attorneys' fees may not be awarded." *Id.* at 469. The catalyst rule was irrelevant to that holding. To the extent that the court considered the catalyst rule, it was with regard to the applicability of the catalyst rule to the facts, not the threshold question of the validity of the catalyst rule. *See Board of Educ. of Downers Grove Grade Sch. Dist. No. 58 v. Steven L.*, *supra*, 89 F.3d at 456-469.

Sch. Dist., #1, 17 F.3d 260, 262-263 and n. 2 (8th Cir. 1994)("We decline to extend *Farrar*'s language beyond its context of determining prevailing party status after a final determination on the merits"); *Kilgour v. City of Pasadena*, 53 F.3d 1007, 1010 (9th Cir. 1995)("*Farrar* does not preclude a catalyst test"); *Beard v. Teska*, 31 F.3d 942, 951-952 (10th Cir. 1994)("we * * * have not agreed [that *Farrar* rendered the catalyst theory nonviable]"); *American Council of the Blind v. Romer*, 992 F.2d 249, 250-251 (10th Cir.), certiorari denied, 510 U.S. 864 (1993) ("It does not appear that the decision in *Farrar* condemns the use of the 'catalyst rule' in a nonjudgment on the merits situation"); *Morris v. City of West Palm Beach*, 194 F.3d 1203, 1206-1207 (11th Cir. 1999) ("The majority of courts that have addressed the question, however, have found that *Farrar*, which does not mention the catalyst test and which did not present a question relating to the form of relief, does not bar the catalyst test. Like the majority of our sister circuit courts which have addressed this issue, * * * we hold that the catalyst test survived *Farrar*"); *Maduka v. Meissner*, 114 F.3d 1240, 1241 (D.C. Cir. 1997) (implicitly upholding catalyst test by examining whether plaintiff's actions led to the extrajudicial relief he obtained).

Subsequent to these cases, this Court once again had the opportunity to address this issue. In *Friends of the Earth,*

Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S.167, 120 S. Ct. 693 (2000), this Court stated expressly that the issue of the catalyst rule was not addressed in *Farrar* (*id.* at 711):

> The case involved no catalytic effect. Recognizing that the issue was not presented for this Court's decision in *Farrar*, several Courts of Appeals have expressly concluded that *Farrar* did not repudiate the catalyst theory.[8/]

Thus, the court of appeals erroneously relied on *Farrar* as overruling the catalyst rule.[9/]

[8/] The United States Government filed a brief as *Amicus Curiae* in support of the petitioners in *Laidlaw* on this issue. The Government's brief agreed with petitioner's position that the catalyst theory continues to be available to plaintiffs in cases involving fee-shifting statutes. The relevant portions of that *amicus* brief are included in the appendix hereto.

[9/] In Respondent's Brief in Opposition to Petition for a Writ of Certiorari (pp. 16-21), respondents argued that this case was not an inappropriate vehicle to examine the issue of the catalyst rule because the West Virginia Legislature took the action to repeal the "self-preservation"regulations, not the respondents themselves. It is irrelevant that the relief granted here was by the West Virginia legislature. There is nothing in the catalyst rule which turns on the person or entity that took the action to give the plaintiff the relief requested. Consequently, the catalyst rule has been applied where the relief has been provided by a legislative body. *See, e.g. Paris v. U.S. Department of Housing and Urban Development*, 988 F.2d 236, 241 (1st Cir. 1993) ("The fact that Congress delivered the plaintiffs' requested relief rather than the parties sued, HUD and Corcoran, provides no relevant distinction. Corcoran, HUD, and Congress are manifestations of the same entity, the government. HUD is simply an instrument of Congress' will, and Corcoran does HUD's bidding"); *Institutionalized Juveniles v. Secretary of Public Welfare*, 758 F.2d 897, 917 (3d Cir. 1985) ("When a state agency seeks to reform its procedures through the state legislature and new procedures are enacted, we agree with the district court that 'passage [of the 1976 Act] is properly attributable' to defendants").

II
THE LEGISLATIVE HISTORY OF SEVERAL FEE-SHIFTING STATUTES SUPPORTS THE APPLICABILITY OF THE CATALYST RULE

Congress has clearly indicated its support for the catalyst rule in the legislative history of numerous fee-shifting statutes.

Congress made its position on the catalyst rule clear in the legislative history accompanying Section 304 of the Clean Air Act (42 U.S.C. 7604). The Senate Report stated (S. Rep. No. 1196, 91st Cong., 2d Sess. 38 (1970)):

> The Courts should recognize that in bringing legitimate actions under this section citizens would be performing a public service and in such instances the courts should award costs of litigation to such party. This should extend to plaintiffs in actions which result in successful abatement but do not reach a verdict. For instance, if as a result of a citizen proceeding and before a verdict is issued, a defendant abated a violation, the court may award litigation expenses borne by the plaintiffs in prosecuting such actions.

The Senate Report accompanying the Federal Water Pollution Control Act contains identical language in its discussion of the fee-shifting provision of the Act (Section 505, 33 U.S.C. 1365). *See* S. Rep. No. 414, 92d Cong., 1st Sess. 81 (1971), 2 A Legislative History of the Water Pollution Control Act Amendments of 1972, p. 1499 (1973).

The legislative history of 42 U.S.C. 1988, the Civil Rights Attorney's Fees Awards Act of 1976, also makes clear the importance of both the fee shifting statutes themselves and the need for the catalyst rule. S. Rep. No. 1011, 94th Cong., 2d Sess. 2 (1976) states:

> In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.

The Report further said that "fee awards are essential if the Federal statutes to which [this section] applies are to be fully enforced." *Id.*, p. 5. Then, in a statement directly relevant here, the Senate Report said that, "for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief." *Ibid.* The House Report on the same Act stated (H.R. Rep. No. 1558, 94th Cong., 2d Sess. 7 (1976)):

> The phrase "prevailing party" is not intended to be limited to the victor only after entry of a final judgment following a full trial on the merits. * * * If the litigation terminates by consent decree, for example, it would be proper to award counsel fees [citations omitted]. A "prevailing" party should not be penalized for seeking an out-of-court settlement, thus helping to lessen docket congestion. Similarly, after a complaint is filed, a defendant might voluntarily cease the unlawful practice. A court should still award fees even though it might conclude, as a matter of equity, that no formal relief, such as an injunction, is needed.

Congress revisited this issue again when looking at the fee-shifting provisions of the Equal Access to Justice Act, 28 U.S.C. 2412 (H.R. Rep. No. 1418, 96th Cong., 2d Sess. 11 (1980)):

> Under existing fee-shifting statutes, the definition of

> prevailing party has been the subject of litigation. It is the committee's intention that the interpretation of the term in S. 265 be consistent with the law that has developed under existing statutes. Thus, the phrase "prevailing party" should not be limited to a victor only after entry of a final judgment following a full trial on the merits.

Thus, Congress intended plaintiffs who obtained relief through the action of the defendant without a judgment or settlement to be prevailing parties under fee-shifting statutes.

III
PUBLIC POLICY SUPPORTS THE APPLICABILITY OF THE CATALYST RULE

The decision of the Fourth Circuit that the catalyst rule no longer exists would seriously undermine the effectiveness of fee-shifting statutes in the environmental, civil rights and other fields.

Congress intended fee-shifting statutes to encourage the bringing of litigation under the statutes that contain them. This position was made clear by Congress in the legislative history of the Civil Rights Attorneys' Fees Awards Act. The Senate Report on that Act stated (S. Rep. No. 1011, *supra*, p. 2):

> All of these civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain.

The Senate Report further stated (*id.*, p. 3):

> The idea of the "private attorney general" is not a new one, nor are attorneys' fees a new remedy. Congress has

commonly authorized attorneys' fees in laws under which "private attorneys general" play a significant role in enforcing our policies. We have, since 1870, authorized fee shifting under more than 50 laws * * *. As former Justice Tom Clark found, in a union democracy suit under the Labor-Management Reporting and Disclosure Act (Landrum -Griffin), "Not to award counsel fees in cases such as this would be tantamount to repealing the Act itself by frustrating its basic purpose."

The Senate Report accompanying the Clean Water Act makes clear that the fee-shifting provision of the statute was likewise intended to encourage the bringing of citizen suits. S. Rep. No. 414, 92d Cong., 1st Sess. 81 (1971). As a result, the Court of Appeals for the Third Circuit has stated that Congress intended the Clean Water Act to induce attorneys to be willing to bring these cases. *Student Public Interest Research Group of New Jersey v. AT&T Bell Laboratories*, 842 F.2d 1436, 1448-1449 (1988). Congress did this by providing for compensation at market rates so that attorneys handling these cases would be compensated, when the litigation was successful, to the same degree as when they did other legal work and would be attracted to continue doing such work in the future. *Ibid.*

Congress again reiterated the importance of fee-shifting statutes when amending 28 U.S.C. 2412 to allow the recovery of fees against the United States under the Equal Access to Justice Act. There, Congress stated (H.R. Rep. No. 1418, 96th Cong., 2d Sess. 9 (1980)):

> The American rule is grounded in the belief that a losing party should not be penalized for merely exercising his or her right to prosecute or defend a lawsuit. Thus, one of the stated purposes of the American rule is not to

> discourage or deter litigation. However, in many cases, particularly in litigation with the Government, the American rule is in fact having the opposite effect. For many citizens, the costs of securing vindication of their rights and the inability to recover attorney fees preclude resort to the adjudicatory process.

This Court has also recognized the importance of fee-shifting provisions in federal statutes. In a case dealing with the fee-shifting provision of the Civil Rights Act of 1964, this Court stated (*Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 401-402 (1968)):

> When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law. * * * If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. Congress therefore enacted the provision for counsel fees * * * to encourage individuals injured by racial discrimination to seek judicial relief * * *. (footnotes omitted)

See also Evans v. Jeff D., 475 U.S. 717, 741 (1986)(Section 1988 gives "victims of civil rights violations a powerful weapon that improves their ability to employ counsel, to obtain access to the courts, and thereafter to vindicate their rights").

The catalyst rule carries out Congress' intent. It provides for the payment of attorneys' fees when the case has been successful in providing the plaintiff with all or a substantial portion of the relief requested. It should make no difference whether the relief came through a court judgment,

a settlement or the decision of the defendant to provide redress due to the litigation. As the Court of Appeals for the Third Circuit has stated, "from a policy standpoint, if defendants could deprive plaintiffs of attorney's fees by unilaterally mooting the underlying case by conceding to plaintiffs' demands, attorneys might be more hesitant about bringing these civil rights suits, a result inconsistent with Congress' intent in enacting section 1988". *Baumgartner v. Harrisburg Housing Authority*, *supra*, 21 F.3d at 548.[10/]

If the catalyst rule did not exist, attorneys would be extremely leary about bringing litigation under fee-shifting statutes no matter how strong their cases appeared to be. Attorneys are willing to take the risk that their evaluation of the strength of their case is overly optimistic. If this turns out to be true and the case is lost, they bear that risk. However, they cannot bear the risk that they were absolutely correct about the strength of their case and, as a result, the defendant chooses, prior to resolution by the court, to provide the relief requested. In other words, attorneys can bear the risk of losing litigation, but not of winning it.

The abolition of the catalyst rule would be particularly severe since the attorneys may lose their fees and expenses by action of the defendant at any time during the litigation. The case can be litigated for years. If the defendant then

[10/] The Court of Appeals for the Eleventh Circuit in *Morris v. City of West Palm Beach* likewise recently emphasized the importance of the catalyst rule (194 F.3d at 1207):

> The catalyst test creates incentives for plaintiffs to initiate potentially meritorious civil rights cases and for plaintiffs to discontinue litigation after receiving through the defendant's acquiescence the remedy initially sought. In light of its long history and the important policies undergirding the catalyst test, we will not extend *Farrar* to eliminate the catalyst test.

moots the case by granting relief, even when the case is on appeal or in this Court, the abolition of the catalyst rule would mean all the fees and expenses would be lost. Few attorneys would be willing or able to take such a risk.

Many of the cases brought under fee-shifting statutes, such as environmental cases, involve major, complex litigation requiring substantial resources. The clients in this type of litigation rarely can pay any significant portion of the fees or costs. Hundreds or thousands of hours and tens or hundreds of thousands of dollars may need to be expended.

The *Laidlaw* case is a good example. *Laidlaw*, a Clean Water Act case against a private polluter, was brought in June 1992. Since the beginning of this case, over eight years ago, plaintiffs' attorneys' have expended approximately 9,000 hours and $230,000 in expenses on this case. While the case was in this Court, the defendant claimed that the case had become moot because the incinerator had been dismantled. This Court remanded the issue of mootness to the lower courts for resolution.[11/] If the case is found moot, and the catalyst rule is abolished, plaintiffs' counsel would be denied fees over eight years after the case was brought.[12/]

[11/] The Court also remanded another issue of mootness relating to the defendant's earlier actions in bringing itself into compliance with its permit.

[12/] *Amici* note that the case is now stayed because Laidlaw (now Safetey-Kleen, Corp.) Has declared bankruptcy.

IV

THE CASE SHOULD BE REMANDED BACK TO THE DISTRICT COURT TO ADDRESS THE FACTUAL ISSUE OF WHETHER PETITIONERS HAVE SATISFIED THE REQUIREMENTS OF THE CATALYST RULE

The district court held that the catalyst rule did not apply in the Fourth Circuit under *S-1 & S-2*. Pet. App. A17. It stated (*ibid.*):

> The "catalyst theory" deems a plaintiff to have prevailed when he or she obtains some portion of the relief originally sought through a defendant's voluntary conduct, even though no formal judgment in his or her favor has been rendered. Were this argument viable, plaintiffs might prevail on this theory.

It is therefore clear that the district court found that the requirements of the catalyst rule might well have been satisfied if it were applicable in the Fourth Circuit but it did not determine this issue.

In *Laidlaw*, this Court granted a writ of certiorari as to the validity of the catalyst rule. However, in remanding the case for further determinations on the issue of mootness, the Court stated that "[i]t is for the District Court, not this Court, to address in the first instance any request for reimbursement of costs, including fees." *Friends of the Earth v. Laidlaw Environmental Services, TOC*, *supra*, 120 S. Ct at 712. Similarly, here, the case should be remanded to the district court to determine if the requirements of the catalyst rule have been satisfied.

CONCLUSION

For the foregoing reasons, *amici* urge this Court to hold that plaintiffs in actions arising under fee-shifting statutes can recover attorneys' fees under the catalyst rule and to remand the case to the district court to determine the applicability of the catalyst rule to the facts of this case.

Respectfully submitted,

Bruce J. Terris
Carolyn Smith Pravlik
Sarah A. Adams

Counsel for Amici

APPENDIX

No. 98-822

In the Supreme Court of the United States

FRIENDS OF THE EARTH, INC., ET AL., PETITIONERS

v.

LAIDLAW ENVIRONMENTAL SERVICES (TOC), INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

SETH P. WAXMAN
Solicitor General
Counsel of Record
LOIS J. SCHIFFER
Assistant Attorney General
LAWRENCE G. WALLACE
Deputy Solicitor General
JEFFREY P. MINEAR
Assistant to the Solicitor General
DAVID C. SHILTON
R. JUSTIN SMITH
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

D. The Court of Appeals' Judgment Should Be Vacated And The Case Remanded For Further Proceedings, Including Appropriate Proceedings Respecting Petitioners' Entitlement To Litigation Costs

For the foregoing reasons, we submit that the court of appeals erred in concluding that the district court's determination not to award injunctive relief rendered this case moot. If the Court agrees, then there will be no occasion to reach the question whether citizens may recover litigation costs if the citizen action becomes moot as a consequence of the defendant's cessation of its unlawful conduct. Under this Court's normal practice, the case will be remanded for resolution of the remaining issues that the court of appeals did not reach, including the question of petitioners' standing.

The question of attorneys' fees can be addressed once the litigation has run its course. We nevertheless observe that there is good reason to question the court of appeals' dictum that "[petitioners'] failure to obtain relief on the merits of their claim precludes any recovery of attorneys' fees or litigation costs because such an award is available only to a 'prevailing or substantially prevailing party.'" Pet. App. 9a n.5. This Court indicated in *Gwaltney* that citizens would be entitled to recover litigation costs for suits that "result in successful abatement but do not reach a verdict." 484 U.S. at 67 n.6 (quoting S. Rep. No. 414, 92 Cong., 2d Sess. 81 (1971)). At the time of that suit, Section 505(d) of the Clean Water Act authorized courts to award attorneys' fees "whenever the court determines such award is appropriate." 33 U.S.C. 1365(d) (1982). Congress has since revised Section 505(d) to allow an award of litigation costs "to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate." 33 U.S.C. 1365(d). The amendment, which prohibits a court from

awarding fees to a losing party, does not appear to restrict the court's power to award fees to a citizen who can show that the suit prompted the defendant to come into compliance.

The Court has previously indicated, in connection with other federal statutes that authorize "prevailing parties" to recover attorneys' fees, that a plaintiff whose suit induces the defendant to comply with the law voluntarily is a "prevailing party." For example, the Court stated in *Hewitt*, *supra*, a case arising under 42 U.S.C. 1983, that "[i]t is settled law, of course, that relief need not be judicially decreed in order to justify a fee award under [42 U.S.C.] 1988." 482 U.S. at 760. The Court explained:

> A lawsuit sometimes produces voluntary action by the defendant that affords the plaintiff all or some of the relief he sought through a judgment – *e.g.*, a monetary settlement or a change in conduct that redresses the plaintiff's grievances. when that occurs, the plaintiff is deemed to have prevailed despite the absence of a formal judgment in his favor.

Id. at 760-761. See also *Maher v. Gagne*, 448 U.S. 122, 129 (1980) ("for purposes of the award of counsel fees [under 42 U.S.C. 1988], parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief")(quoting S. Rep. No. 1011, 94th Cong., 2d Sess. 5 (1976)).

The Court's decision in *Farrar v. Hobby*, 506 U.S. 103 (1992), which states that, "to qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim," *id.* at 111, does not repudiate the reasoning in *Hewitt* and *Maher*. A plaintiff prevails on the "merits of his claim" if a court finds that the defendant, in direct response to the plaintiff's suit, has altered his behavior in a way that renders the claim moot as a matter of law. See *Hewitt*, 482 U.S. at 761 ("In all civil litigation, the judicial

decree is not the end but the means.").

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for further proceedings.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
LOIS J. SCHIFFER
Assistant Attorney General
LAWRENCE G. WALLACE
Deputy Solicitor General
JEFFRY P. MINEAR
Assistant to the Solicitor General
DAVID C. SHILTON
R. JUSTIN SMITH
Attorneys

MAY 1999

(6) NOV 20 2000

11-20-2000

No. 99-1848

IN THE

Supreme Court of the United States

BUCKHANNON BOARD AND CARE HOME INC., et al.,
Petitioners,

v.

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, et al.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

BRIEF FOR PUBLIC CITIZEN AND THE AMERICAN CIVIL LIBERTIES UNION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

BRIAN WOLFMAN
(Counsel of Record)
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street, NW
Washington, D.C. 20009
(202) 588-1000

ARTHUR B. SPITZER
ACLU OF THE
NATIONAL CAPITAL AREA
1400 20th Street, NW
Washington, DC 20036
(202) 457-0800

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
125 Broad Street
New York, NY 10004
(212) 549-2500

HARVEY GROSSMAN
ADAM SCHWARTZ
ROGER BALDWIN FOUNDATION
OF ACLU, INC.
180 North Michigan Avenue
Chicago, IL 60601
(312) 201-9740

27pp

QUESTION PRESENTED

Whether a plaintiff is a "prevailing party" for the purpose of fee-shifting statutes where, as a result of the litigation, the defendant provides the relief the plaintiff sought in the complaint.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF AMICI 1

STATEMENT OF THE CASE 2

SUMMARY OF THE ARGUMENT 3

ARGUMENT 5

I. The Text And Purpose Of Fee-Shifting Statutes Support A "Catalyst" Theory Of Fee Recovery 7

II. This Court's Decisions Teach That The Fourth Circuit's Ruling Is Wrong 11

III. The Fourth Circuit's Rule Leads To Anomalous Results 16

CONCLUSION 19

TABLE OF AUTHORITIES

CASES

Arvinger v. Mayor and City Council of Baltimore, 31 F.3d 196 (4th Cir. 1994) 9

Baumgartner v. Harrisburg Hous. Auth., 21 F.3d 541 (3d Cir. 1994) 8, 14, 15, 18

Beard v. Tedska, 31 F.3d 942 (10th Cir. 1994) 8

Chesapeake Bay Found. v. United States Dep't of Agric., 11 F.3d 211 (D.C. Cir. 1993) 1

Citizens Against Tax Waste v. Westerville City Sch., 985 F.2d 255 (6th Cir. 1993) 8

Clark v. Sims, 28 F.3d 420 (4th Cir. 1994) 8

Comfort Lake Ass'n, Inc. v. Dresel Contracting, Inc., 138 F.3d 351 (8th Cir. 1998) 8

County of Riverside v. McGlaughlin, 500 U.S. 44 (1991) 17

Craig v. Gregg County, Texas, 988 F.2d 18 (5th Cir. 1993) 8

DeMier v. Gondles, 676 F.2d 92 (4th Cir. 1982) 6

Dunn v. Florida Bar, 889 F.2d 1010 (11th Cir. 1989) 1

Evans v. Jeff D., 475 U.S. 717 (1986) 3, 5, 16, 18

Farrar v. Hobby, 506 U.S. 103 (1992) 12, 13, 14

Friends of the Earth v. Laidlaw Envtl. Services,
120 S. Ct. 693 (2000) 3, 13

Friends of the Earth v. Laidlaw Envtl. Services,
149 F.3d 303 (4th Cir. 1998),
rev'd on other grounds, 120 S. Ct. 693 (2000) 9

Hanrahan v. Hampton, 446 U.S. 754 (1979)..... 12

Hensley v. Eckerhart, 461 U.S. 424 (1983) 8, 12, 14

Hewitt v. Helms, 482 U.S. 755 (1987)..... 4, 8, 11, 14

Jan R. Smith Constr. Co. v. DeKalb County,
18 F. Supp. 2d 1365 (N.D. Ga. 1998) 7

Johnson v. LaFayette Fire Fighters Assoc., Local 472,
51 F.3d 726 (7th Cir. 1995) 7

Jones v. Brown, 41 F.3d 634 (Fed. Cir. 1994) 1

Kilgour v. City of Pasadena,
53 F.3d 1007 (9th Cir. 1995) 8

K.L. v. Edgar, No. 92 C 5722, 2000 WL 1499445
(N.D. Ill. Oct. 6, 2000)..... 7

Klamath Siskiyou Wildlands Ctr. v. Babbitt,
105 F. Supp. 2d 1132 (D. Ore. 2000) 7

Luethje v. Peavine Sch. Dist.,
872 F.2d 352 (10th Cir. 1989) 6

Maduka v. Meissner, 114 F.3d 1240 (D.C. Cir. 1997) 8

Maher v. Gagne, 448 U.S. 122 (1980) 4, 8, 12, 15, 16

Marbley v. Bane, 57 F.3d 224 (2d Cir. 1994) 8, 15

Marek v. Chesney, 473 U.S. 1 (1985)..... 3, 5

Melkonyan v. Sullivan, 501 U.S. 89 (1991) 1

Newman v. Piggie Park Enters., Inc.,
390 U.S. 400 (1968)..... 5

Ortiz de Arroyo v. Barcelo,
765 F.2d 275 (1st Cir. 1985)..... 6

Paris v. United States Dep't of Housing and Urban Dev.,
988 F.2d 236 (1st Cir. 1993)..... 8

Ragin v. Harry Macklowe Real Estate Co.,
870 F. Supp. 510 (S.D.N.Y. 1994) 10

Rhodes v. Stewart, 488 U.S. 1 (1988)..... 15

S-1 and S-2 v. State Bd. of Educ.,
21 F.3d 49 (4th Cir. 1994)..... 3, 8, 13

Shalala v. Schaefer, 509 U.S. 292 (1993)..... 1

Statewide Reapportionment Advisory Comm. v. Beasley,
99 F.3d 134 (4th Cir. 1996)..... 9

Texas State Teachers Ass'n v. Garland Indep. Sch. Dist., 489 U.S. 782 (1989) 5, 8, 14

Wade v. Coughlin, 2000 U.S. App. LEXIS 11583 (4th Cir. May 24, 2000) 9, 17

Zinn by Blankenship v. Shalala, 35 F.3d 273 (7th Cir. 1994) 8, 14

STATUTES

42 U.S.C. § 1988 4

42 U.S.C. § 3613(a)-(e) 9

42 U.S.C. § 3613(c)(2) 3, 5

42 U.S.C. § 12205 ..... 3, 5

MISCELANEOUS

H.R. Rep. 100-711, 100th Cong., 2d Sess. (1988) 9, 10

H.R. Rep. 101-422, pt. II, 101st Cong., 2d Sess. (1990) 10

H.R. Rep. 101-485, pt. III, 101st Cong., 2d Sess. (1990) 10

H.R. Rep. 94-1558, 94th Cong. 2d Sess. (1976) 4, 9, 11

S. Rep. 94-1011, 94th Cong., 2d Sess. (1976) 4, 6, 12

S. Rep. 98-233, 98th Cong., 1st Sess. (1983) 11

S. Rep. 99-50, 99th Cong., 1st Sess. (1985) 11

WEBSTER'S UNABRIDGED DICTIONARY (2d ed. 1979) 7

INTEREST OF AMICI[1]

Public Citizen is a non-profit, consumer advocacy organization with approximately 150,000 members nationwide. Since 1971, Public Citizen has been active in the courts, in Congress, and before regulatory agencies concerning the enforcement of a wide range of health, safety, environmental, and consumer legislation. Public Citizen has represented plaintiffs in litigation over federal fee-shifting statutes in a wide variety of cases. *See, e.g., Shalala v. Schaefer*, 509 U.S. 292 (1993); *Melkonyan v. Sullivan*, 501 U.S. 89 (1991); *Jones v. Brown*, 41 F.3d 634 (Fed. Cir. 1994); *Chesapeake Bay Found. v. United States Dep't of Agric.*, 11 F.3d 211 (D.C. Cir. 1993), *cert. denied*, 513 U.S. 927 (1994); *Dunn v. Florida Bar*, 889 F.2d 1010 (11th Cir. 1989), *cert. denied*, 498 U.S. 811 (1990). In all of these cases, Public Citizen has sought to further the policies behind federal fee-shifting legislation: providing a means for ordinary citizens to enforce federal law.

The American Civil Liberties Union is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. In pursuit of those goals, the ACLU maintains an active litigation program in all fifty states. In seeking to provide access to the courts to victims of civil liberties and civil rights abuses,

---

[1] Counsel for the parties have consented to the filing of this *amici curiae* brief, and the letters of consent are being filed with the Court simultaneously with the filing of this brief. Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party has authored this brief in whole or in part, and that no person or entity other than Public Citizen and the ACLU has made a monetary contribution to the preparation or submission of this brief.

the ACLU relies in part on the recovery of court-awarded fees. The ACLU believes that the Fourth Circuit's restrictive interpretation of the fee-shifting statutes will hamper enforcement of the civil rights laws contrary to congressional intent. Since its founding in 1920, the ACLU has appeared before this Court on numerous occasions, both as counsel for parties and as *amicus curiae*.[2]

STATEMENT OF THE CASE

Petitioners' lawsuit challenged certain West Virginia fire safety regulations (the "self-preservation rules") that required persons living in residential care homes to be able to evacuate without assistance in the event of danger. The complaint alleged that these rules discriminated against disabled nursing home residents in violation of the federal Fair Housing Amendments Act ("FHAA") and the Americans with Disabilities Act ("ADA").

The lawsuit was filed within days after state authorities issued Cease and Desist Orders to the petitioner Buckhannon Board and Care Home to expel its residents who could not self-evacuate, or to close its doors. At the TRO hearing, the defendants agreed to the entry of a court order indefinitely staying enforcement of the Cease and Desist Orders, and such an order was entered shortly thereafter. (Docket Entry No. 9)

More than two years later, after extensive discovery and briefing, the defendants repealed the self-preservation rules (technically, that action was taken by the state legislature, which

[2] The ACLU of the National Capital Area is co-counsel in *Wade v. Coughlin*, *pet. for cert. pending*, No. 00-75 (filed July 14, 2000), which presents the same question as this case.

apparently must promulgate and amend all administrative rules, *see* W. Va. Code § 29A-3-1 et seq.). The lawsuit was then dismissed as moot.

Plaintiffs applied for attorney's fees under the applicable provisions of the FHAA, 42 U.S.C. § 3613(c)(2), and the ADA, 42 U.S.C. § 12205. The district court recognized that their lawsuit may well have been the catalyst for the repeal of the self-preservation rules. (Pet. App. A-17) Nonetheless, the court denied the fee request without making a finding of fact on that issue because the Fourth Circuit has ruled that a party that obtains the relief it seeks through unilateral action of the defendant, rather than through a formal judgment or settlement, cannot be a "prevailing party" under the various federal fee-shifting statutes. *See S-1 and S-2 v. State Bd. of Educ.*, 21 F.3d 49 (4th Cir.) (en banc), *cert. denied*, 513 U.S. 876 (1994). The Fourth Circuit affirmed. (Pet. App. A-9)

SUMMARY OF THE ARGUMENT

Fee-shifting statutes, which enable individuals to act as "private attorneys general," are a cornerstone of enforcement of vital federal laws involving civil rights, health, safety, and the environment. *Marek v. Chesney*, 473 U.S. 1, 43-51 (1985); *Evans v. Jeff D.*, 475 U.S. 717, 732, 741 (1986). For decades, federal courts have interpreted these fee-shifting statutes to allow recovery where the plaintiff's lawsuit acts as a "catalyst" for the defendant providing the relief sought by the plaintiff, even where there is no formal action by the court or settlement agreement. *Friends of the Earth v. Laidlaw Envtl. Services*, 120 S. Ct. 693, 711 (2000) (collecting cases).

These courts follow the text and legislative history of the fee-shifting statutes. For example, the Civil Rights

Attorney's Fees Awards Act, 42 U.S.C. § 1988 ("Section 1988"), provides fees to the "prevailing party," which plainly should include parties who prevail because the defendant provided the relief sought by the plaintiff in response to the litigation. The Senate Report accompanying Section 1988 states: "[F]or purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief." S. Rep. 94-1011, 94th Cong., 2d Sess. 5 (1976). *See also* H.R. Rep. 94-1558, 94th Cong., 2d Sess. 7 (1976) ("[A]fter a complaint is filed a defendant might voluntarily cease the unlawful practice. A court should still award fees even though it might conclude, as a matter of equity, that no formal relief, such as an injunction, is needed.").

This statutorily grounded catalyst rule has also been recognized in the decisions of this Court. For example, in *Hewitt v. Helms*, 482 U.S. 755, 760-61 (1987), this Court explained: "if a defendant, under pressure of the lawsuit, alters his conduct (or threatened conduct) towards the plaintiff that was the basis for the suit, the plaintiff will have prevailed." *See also Maher v. Gagne*, 448 U.S. 122, 129 (1980) ("Nothing in the language of section 1988 conditions the district court's power to award fees on full litigation of the issues or on a judicial determination that the plaintiff's rights have been violated.").

Finally, the catalyst rule is necessary to accomplish the congressional policies animating the fee-shifting statutes: obtaining competent counsel, and promoting compliance with federal law. *See* S. Rep. 94-1011, 94th Cong., 2d Sess. 5 (1976). First, the catalyst rule helps parties attract counsel by ensuring payment of fees in cases where the litigation causes the defendant to materially alter its conduct. Second, the catalyst

rule insures that fee-shifting statutes have their intended effect of promoting compliance with federal law by encouraging defendants promptly to alter their conduct in order to minimize their ultimate fee liability. In short, the catalyst rule is necessary if attorney's fees are to remain part of "the arsenal of remedies available to combat violations of civil rights." *Jeff D.*, 475 U.S. at 732.

The Fourth Circuit alone has rejected the catalyst theory. This ruling is contrary to the plain meaning and legislative history of the fee-shifting statutes, the teachings of this Court, and congressional policy. Accordingly, the decision below must be reversed.

ARGUMENT

More than 100 federal fee shifting statutes provide for an award of fees to successful plaintiffs. *See Marek v. Chesney*, 473 U.S. 1, 43-51 (1985) (listing federal statutes authorizing awards of attorney's fees). Congress enacted these fee-shifting statutes to encourage enforcement of federal law by "private attorneys general." *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 793 (1989). Like most fee-shifting statutes, the Americans With Disabilities Act ("ADA") and the Fair Housing Amendments Act of 1988 ("FHAA") provide for a reasonable attorney's fee for the "prevailing party." 42 U.S.C. § 12205; 42 U.S.C. § 3613(c)(2).

For two reasons, the catalyst rule is a critical component of these fee-shifting statutes. First, "Congress expected fee shifting to attract competent counsel to represent citizens deprived of their civil rights." *Jeff D.*, 475 U.S. at 731. *See also Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968) (fee-shifting under Title II of 1964 Civil Rights Act

allows individuals to employ counsel, obtain access to the courts, and vindicate their rights). Abandonment of the catalyst rule would undermine this goal. The catalyst rule ensures payment of fees where the defendant unilaterally changes its conduct, including in cases where the defendant does so after years of litigation. *See, e.g., Ortiz de Arroyo v. Barcelo*, 765 F.2d 275 (1st Cir. 1985) (fees awarded where government lifted land use restrictions after two years of litigation under the Takings Clause, including discovery and failed settlement negotiations). Without the catalyst rule, counsel would obtain no fee even in cases with a successful result, and counsel thus would be less likely to take a case in which fee-shifting is the primary source of compensation. *See* S. Rep. 94-1011, 94th Cong., 2d Sess. 5 (1976) ("If the cost of private enforcement actions becomes too great, there will be no private enforcement. If our civil rights laws are not to become mere hollow pronouncements which the average citizen cannot enforce, we must maintain the traditionally effective remedy of fee shifting in these cases.").

Second, "fees are an integral part of the remedy necessary to achieve compliance with our statutory policies." S. Rep. 94-1011, 94th Cong., 2d Sess. 5 (1976). The catalyst rule insures that fee-shifting statutes have their intended effect of promoting compliance with federal law by encouraging defendants promptly to alter their conduct in order to minimize their ultimate fee liability. *See, e.g., Luethje v. Peavine Sch. Dist.*, 872 F.2d 352 (10th Cir. 1989) (public school lifted gag order less than one month after employee filed First Amendment challenge); *DeMier v. Gondles*, 676 F.2d 92 (4th Cir. 1982) (sheriff suspended blanket strip-search policy at county jail less than two months after filing of Fourth Amendment challenge).

Time and again, the courts have properly relied upon the

catalyst rule to reimburse plaintiffs who have vindicated important federal rights. As one would expect, the catalyst rule has been applied in cases that span the entire spectrum of views on important public policy questions. Plaintiffs who have been awarded fees under the catalyst rule include both individuals and organizations, and they are represented both by private practitioners (as in the cases above) and non-profit advocacy organizations. *See, e.g., Johnson v. LaFayette Fire Fighters Assoc., Local 472*, 51 F.3d 726 (7th Cir. 1995) (challenge to union's accounting procedures brought by non-union firefighters represented by National Right to Work Legal Defense Foundation); *Klamath Siskiyou Wildlands Ctr. v. Babbitt*, 105 F. Supp. 2d 1132 (D. Ore. 2000) (Endangered Species Act case brought by three environmental organizations); *K.L. v. Edgar*, No. 92 C 5722, 2000 WL 1499445 (N.D. Ill. Oct. 6, 2000) (challenge to conditions in nine psychiatric hospitals brought by class of patients represented by ACLU); *Jan R. Smith Constr. Co. v. DeKalb County*, 18 F. Supp. 2d 1365 (N.D. Ga. 1998) (challenge to government contract set-aside program for minorities and women brought by construction company represented by Southeastern Legal Foundation).

I. The Text And Purpose Of Fee-Shifting Statutes Support A "Catalyst" Theory Of Fee Recovery.

The question in this case is whether a plaintiff has "prevailed" if she obtains the relief she seeks in her suit through the defendant's "voluntary" compliance with her demands. As noted above, the fee provisions of the ADA and the FHAA allow the court to award attorney's fees to the "prevailing party." "Prevail" means "to gain the victory." WEBSTER'S UNABRIDGED DICTIONARY 1426 (2d ed. 1979). Plaintiffs who bring suit to vindicate their federal rights and thereby compel defendants to change their conduct have "gain[ed] the victory"

under any ordinary understanding of those words.

Thus, to "prevail" under the fee-shifting statutes, a plaintiff need not litigate the case to judgment, but need only obtain some of the relief that she sought, *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983), and in so doing materially alter the relationship between the parties. *Texas State Teachers Ass'n*, 489 U.S. at 792. Once that has occurred, the plaintiff need only show that the suit was a causal factor in obtaining the relief, *Hewitt v. Helms*, 482 U.S. 755, 761 (1987), and that the plaintiff's federal claim was not frivolous. *Maher v. Gagne*, 448 U.S. 122, 131 (1980); *Zinn by Blankenship v. Shalala*, 35 F.3d 273, 274 (7th Cir. 1994).

Unlike every other court of appeals to reach the issue,[3] the Fourth Circuit interprets the "prevailing party" statutory language and this Court's jurisprudence to preclude recovery under the well-established "catalyst" theory. The Fourth Circuit first rejected the catalyst theory in a case which interpreted Section 1988. *S-1 and S-2 v. State Board of Educ.*, 21 F.3d 49, 51 (4th Cir.) (en banc), *cert. denied*, 513 U.S. 876 (1994). Later that year, it applied its "no catalyst" rule in two other Section 1988 cases. *Clark v. Sims*, 28 F.3d 420 (4th Cir. 1994);

[3] *See, e.g., Comfort Lake Ass'n, Inc. v. Dresel Contracting, Inc.*, 138 F.3d 351, 357-58 (8th Cir. 1998); *Maduka v. Meissner*, 114 F.3d 1240, 1241 (D.C. Cir. 1997); *Marbley v. Bane*, 57 F.3d 224, 233-35 (2d Cir. 1994); *Kilgour v. City of Pasadena*, 53 F.3d 1007, 1010-11 (9th Cir. 1995); *Zinn by Blankenship v. Shalala*, 35 F.3d 273, 274-76 (7th Cir. 1994); *Beard v. Tedska*, 31 F.3d 942, 950-52 (10th Cir. 1994); *Baumgartner v. Harrisburg Housing Auth.*, 21 F.3d 541, 546-50 (3d Cir. 1994); *Craig v. Gregg County, Texas*, 988 F.2d 18, 20-21 (5th Cir. 1993); *Paris v. United States Dep't of Housing and Urban Dev.*, 988 F.2d 236, 238 (1st Cir. 1993); *Citizens Against Tax Waste v. Westerville City Sch.*, 985 F.2d 255, 257-58 (6th Cir. 1993).

Arvinger v. Mayor and City Council of Baltimore, 31 F.3d 196, 202-03 (4th Cir. 1994). Two years later, the Fourth Circuit applied this rule to a Voting Rights Act case. *Statewide Reapportionment Advisory Cmte. v. Beasley*, 99 F.3d 134, 136-37 (4th Cir. 1996). Thereafter, it was applied to a Clean Water Act case, *Friends of the Earth v. Laidlaw Envtl. Services, Inc.*, 149 F.3d 303 (4th Cir. 1998), *rev'd on other grounds*, 120 S. Ct. 693 (2000), and even more recently to a case arising under the Rehabilitation Act, the ADA, and the Social Security Act, *Wade v. Coughlin*, 2000 U.S. App. LEXIS 11583 (4th Cir. May 24, 2000), *pet. for cert. pending*, No. 00-75 (filed July 14, 2000). Both in theory and in practice, then, the Fourth Circuit's rule dramatically narrows the grounds for fee awards to plaintiffs seeking to vindicate federal civil rights or enforce federal environmental and consumer statutes.

The Fourth Circuit's rule is contrary to the language and purpose of the civil rights laws. Like other such laws, the FHAA contains enforcement provisions allowing private citizens a full range of equitable relief and compensatory and punitive damages. 42 U.S.C. § 3613(a) - (e). The obvious purpose of this provision is to compensate individuals harmed by discrimination, and to deter discrimination in the first place. *See, e.g.*, H.R. Rep. 100-711, 100th Cong., 2d Sess. 39-40 (1988), *reprinted in* 1998 U.S.C.C.A.N. 2200-01 (FHAA lifted limit on punitive damages to provide incentive to bring private enforcement action and to deter wrongful conduct). Without the possibility of a fee award after a successful suit, citizens seeking to enforce this statute will all too often find it difficult to retain counsel. As a result, these rights will exist in name only – out of the reach of ordinary citizens. *See* H.R. Rep. 94-1558, 94th Cong. 2d Sess. 1-3 (1976) (report accompanying

enactment of Section 1988).[4] The legislative history of the FHAA made this very point, noting that there was a lack of effective enforcement because of "disadvantageous limitations on punitive damages and attorney's fees" in the then-current version of the Fair Housing Act. H.R. Rep. 100-711, 100th Cong., 2d Sess. 16 (1988), *reprinted in* 1998 U.S.C.C.A.N. 2177.[5]

Indeed, the House Report accompanying Section 1988 expressly endorses a fee award in cases where a defendant's "voluntary" compliance affords the plaintiff the requested relief, as well as in cases where the plaintiff wins a favorable judgment on the merits, a settlement, or a consent decree.

> The phrase "prevailing party" is not intended to be limited to the victor only after entry of a final judgment following a full trial on the merits . . . If the litigation is terminated by consent decree, for example, it would be proper to award counsel fees . . . . A "prevailing party" should not be penalized for seeking an out-of-court settlement, thus helping to lessen docket congestion. Similarly, after a complaint is filed a defendant might voluntarily cease the unlawful practice. A court should still award fees even though it might conclude, as a matter of equity, that no formal relief, such as an injunction, is needed.

H.R. Rep. 94-1558, 94th Cong., 2d Sess. 7 (1976). Similarly, legislative materials accompanying the 1987 amendments to the Clean Water Act demonstrate that a "prevailing party" is one who settles the case as surely as one who litigates to judgment. *See* S. Rep. 99-50, 99th Cong., 1st Sess. 33 (1985) ("The Committee recognizes that a party may 'prevail' by achieving a successful settlement."); *see also* S. Rep. 98-233, 98th Cong., 1st Sess. 24-25 (1983).

II. This Court's Decisions Teach That The Fourth Circuit's Ruling Is Wrong.

This Court has repeatedly endorsed the catalyst theory of attorney's fee awards, recognizing that a final judgment on the merits is not a necessary prerequisite to achieving "prevailing party" status. For instance, in *Hewitt v. Helms*, 482 U.S. 755 (1987), the Court acknowledged the catalyst theory: "It is settled law, of course, that relief need not be judicially decreed in order to justify a fee award under section 1988." *Id.* at 761. As if to reject the very theory later adopted by the Fourth Circuit, the Court further noted that "[a] lawsuit sometimes produces voluntary action by the defendant that affords the plaintiff all or some of the relief he sought through

---

[4] The legislative history of the ADA's attorney's fee provision specifically notes that it is to "be interpreted in a manner consistent with the Civil Rights Attorney's Fees Act, including that statute's definition of prevailing party, as construed by the Supreme Court." H.R. Rep. 101-485, pt. III, 101st Cong., 2d Sess. 73 (1990), *reprinted in* 1990 U.S.C.C.A.N. 496 (footnotes omitted). *See also* H.R. Rep. 101-422, pt. II, 101st Cong., 2d Sess. 140 (1990), *reprinted in* 1990 U.S.C.C.A.N. 423 ("It is intended that the term 'prevailing party' be interpreted consistently with other civil rights laws").

[5] Prior to the FHAA, the Fair Housing Act limited fees to those who were "not financially able to assume" the cost of fees. *See Ragin v. Harry Macklowe Real Estate Co.*, 870 F. Supp. 510, 515 (S.D.N.Y. 1994) (quoting 42 U.S.C. 3612(c)). Congress understood that the old provision impeded private enforcement of the Act because it required plaintiffs of modest means to choose between filing a discrimination lawsuit and paying for important necessities.

a judgment – *e.g.*, a monetary settlement or a change in conduct that redresses the plaintiff's grievances. When that occurs, the plaintiff is deemed to have prevailed despite the absence of a formal judgment in his favor." *Id.* at 760-61. After all, what one seeks in a lawsuit is not a judicial pronouncement for its own sake, but to change the behavior of the defendant in some way. *Id.* Thus, "if a defendant, under pressure of the lawsuit, alters his conduct (or threatened conduct) towards the plaintiff that was the basis for the suit, the plaintiff will have prevailed." *Id.*

Similarly, in *Maher v. Gagne*, 448 U.S. 122 (1980), the Court stated that "[n]othing in the language of section 1988 conditions the district court's power to award fees on full litigation of the issues or on a judicial determination that the plaintiff's rights have been violated." *Id.* at 129. The Court rejected the argument that a settlement without a judgment on the merits cannot provide "prevailing party" status, quoting a passage of the Senate Report accompanying Section 1988: "[F]or purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief." *Id.* (quoting S. Rep. 94-1011, 94th Cong., 2d Sess. 5 (1976)). *See also Hanrahan v. Hampton*, 446 U.S. 754, 756-57 (1979) (per curiam) (recognizing that a person may "in some circumstances be a 'prevailing party'" if his rights are vindicated "without formally obtaining relief"); *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (prevailing party is one who "succeeds on any significant issue in litigation which achieved some of the benefit the parties sought in bringing suit").

In the Fourth Circuit's view, however, this Court's endorsement of the catalyst theory over the course of a decade was overruled *sub silentio* by *Farrar v. Hobby*, 506 U.S. 103

(1992). No other circuit has adopted that interpretation of *Farrar*, and for good reason: The Court in *Farrar* did not rule on or even consider the validity of the catalyst theory, as this Court noted just last Term in *Laidlaw*, 120 S. Ct. at 167. Rather, the issue in *Farrar* was whether a fee award of $280,000 was reasonable, assuming the plaintiff had technically prevailed through an award of $1 in a suit seeking $17 million. In the course of a general discussion of fee awards under Section 1988, the Court stated that to be a prevailing party, a "plaintiff must obtain at least some relief on the merits of his claim," an "enforceable judgment against the defendant," or "comparable relief through a consent decree or settlement." *Id.* at 111. Citing to the test articulated in *Texas State Teachers*, the Court explained that a "plaintiff prevails when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." 506 U.S. at 111 (citing 489 U.S. at 792).

The Fourth Circuit incorrectly construed the comments in *Farrar* about obtaining relief through an enforceable judgment, consent decree, or settlement as an exhaustive list, foreclosing the possibility of a fee award where the plaintiff achieves relief through voluntary compliance by the defendant. In *S-1 and S-2*, a one-vote *en banc* majority held that a "prevailing party" must achieve success by virtue of "a court's authority," and not by any other means. 21 F.3d at 51. Under that interpretation, fees would not be available even in cases that settle, for an out-of-court settlement usually does not depend on any court action. But that result would directly contradict *Maher v. Gagne*. Nothing in *Farrar*'s holding suggests that prevailing party status may not be achieved in other ways. In fact, the context demonstrates that the list in *Farrar* was not exhaustive, and that the core inquiry remains the one articulated

in *Texas State Teachers*, *Maher*, *Hewitt*, and *Hensley* – alteration of the relationship between a plaintiff and a defendant in a way that benefits the plaintiff. 506 U.S. at 111. As the Third Circuit has noted, "it is not likely that the Supreme Court would overturn such a widespread theory without even once mentioning it, particularly when it was inapplicable to the case at hand." *Baumgartner v. Harrisburg Hous. Auth.*, 21 F.3d 541, 546-50 (3d Cir. 1994); *accord Zinn by Blankenship v. Shalala*, 35 F.3d 273, 274-76 (7th Cir. 1994).

The language in *Texas State Teachers* and *Farrar* that a prevailing party must demonstrate a "material alteration of the legal relationship" was meant to clarify that mere technical victories might be too insignificant to meet the prevailing party threshold. *See* 489 U.S. at 792-93. Once the defendant's behavior has changed to moot the factual basis of the complaint, the legal relationship has been altered because the defendant is no longer acting in violation of legal rights held by the plaintiff. This language cannot be read to require an enforceable judgment before a litigant may be a "prevailing party."

To the contrary, *Texas State Teachers* and *Farrar* reaffirmed the well-established rule that the threshold test for prevailing party status is whether the plaintiff "succeed[ed] on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Farrar*, 506 U.S. at 109 (citing *Hensley*, 461 U.S. at 433); *Texas State Teachers*, 489 U.S. at 789 (citing *Hensley*, 461 U.S. at 433). As Justice O'Connor's concurrence in *Farrar* made clear, the inquiry remains one of causation: whether the plaintiffs succeeded, through the vehicle of the lawsuit, in achieving at least some of the practical relief that they sought by changing the "behavior of the defendant towards the plaintiffs." *Farrar*, 506 U.S. at 116 (O'Connor, J., concurring) (citing *Hewitt*, 482 U.S. at 761).

Once the conditions of causation and substantial benefit to the plaintiff are satisfied, there is no need for the additional requirement that the change in conduct or law be judicially mandated or formalized by judicial decree. *See, e.g., Marbley v. Bane*, 57 F.3d 224, 234 (2nd Cir. 1994); *Baumgartner*, 21 F.3d at 547.

In some cases, like *Texas State Teachers* and *Farrar*, success in the litigation will take the form of a judgment in plaintiff's favor. *See also Rhodes v. Stewart*, 488 U.S. 1, 4 (1988) (party who wins a declaratory judgment prevails if judgment affects "behavior of the defendant toward the plaintiff"). But even if there is no legal judgment to enforce, a change in the defendant's behavior that has the practical effect of redressing the plaintiff's alleged injuries, and the legal effect of mooting out the complaint, means that the plaintiff has "prevailed" as surely as obtaining a declaratory judgment or securing nominal relief. *See Maher*, 448 U.S. at 129. In many cases, a defendant's cessation of illegal conduct will confer a far greater benefit to a plaintiff than the nominal relief embodied in a judgment in *Farrar*. In sum, the decision in *Farrar* does not foreclose a catalyst theory of fee recovery and the Fourth Circuit's holding is contrary to the teachings of this Court's cases.

Under the Fourth Circuit's prohibition on catalyst fee awards, plaintiffs are deprived of any fee award despite their success in vindicating federal rights. If the Fourth Circuit's rule stands, it will virtually assure that fewer meritorious suits to enforce federal rights will be brought. Such a result is contrary to Congress's intent to provide a means for ordinary citizens harmed by violations of federal civil rights, environmental, and other statutes to serve as "private attorneys general."

III. The Fourth Circuit's Rule Leads To Anomalous Results.

The Fourth Circuit's "no-catalyst" rule is not only at odds with the text and purpose of federal fee-shifting statutes, and with this Court's decisions, but it also leads to anomalous results that further underscore the need for reversal.

Under *Maher v. Gagne*, a plaintiff who settles a case favorably without litigating the case to judgment "prevails" for fee-shifting purposes. 448 U.S. at 129. This ruling follows the ordinary meaning of the word "prevail" and congressional intent. *Maher* is also consistent with the policy in favor of settlement, *see Jeff D.*, 475 U.S. at 733, because if the rule were otherwise, cases would be far less likely to settle.

The "catalyst" cases, where the Fourth Circuit denies fees, are analytically indistinguishable from the "settlement" cases, where this Court allows fees. In both kinds of cases, no court has found a violation of federal law, because the defendant's actions have eliminated the need to do so. And in both cases, the defendant has altered its conduct with respect to the plaintiff as a result of a lawsuit alleging a violation of federal law. There is no reason to treat the two situations differently for fee shifting purposes, as the following hypothetical example illustrates:

Assume, for instance, that the plaintiff sues to enjoin a county prosecutor's policy for conducting arraignment and probable cause hearings for accused prisoners, arguing that the county's policy of conducting such hearings within 72 hours of arrest violates the Fourth Amendment. After the filing of summary judgment briefs and an argument before the court that reveals the court's serious concerns about the constitutionality

of the county's conduct, the parties enter into settlement discussions. The county tentatively agrees to do what the plaintiff maintains the Constitution requires – hold probable cause determinations within 48 hours of arrest. A settlement agreement is drafted in which the defendant agrees to adopt a new policy and the plaintiff agrees to release his claims, reserving the right to apply for attorney's fees. Then, before a settlement is signed, the county simply announces that it has changed its policy and moves to dismiss the case as moot. The plaintiff acknowledges that the new policy is lawful. *See County of Riverside v. McGlaughlin*, 500 U.S. 44 (1991). The court then dismisses the case on mootness grounds, accepting the defendant's representation that the change of policy is permanent.

In such circumstances, plaintiff should be entitled to fees on a catalyst theory, because the objectives of federal law have been well served, despite the absence of a formal settlement agreement. More importantly, if fees are not awarded on a catalyst theory, defendants will avoid fees by unilaterally ending their misconduct and refusing to enter a formal settlement agreement, as happened in this case and in *Wade v. Coughlin*, 2000 U.S. App. LEXIS 11583, *pet. for cert. pending*, No. 00-75 (filed July 14, 2000) (state abandoned challenged policy after more than four years of litigation, shortly before trial). In fact, the Fourth Circuit's repudiation of the catalyst theory acts to encourage defendants to delay abandonment of their wrongful conduct. Defendants may protract the litigation, hoping to exhaust the plaintiff's resources, secure in the knowledge that they can wait until the eleventh hour before changing their position – and still avoid payment of any attorney's fees.

With lawyers aware of this reality, individuals whose federal rights are being violated will find it more difficult to find

counsel willing to handle their cases without payment of fees in advance. *See Baumgartner*, 21 F.3d at 548. Contrary to congressional intent, this would effectively remove attorney's fees from the "arsenal of remedies available to combat violations of civil rights." *Jeff D.*, 475 U.S. at 732. As discussed earlier, *see* p. 6, *supra*, the threat of an adverse fee award encourages many defendants to conform their conduct to the law at the earliest point in time. If the coercive effect of fee-shifting statutes is eroded by the abandonment of the catalyst theory, plaintiffs as well as the courts will lose an important and valuable tool in the resolution of public interest litigation.

This Court should reject such anomalous results, recognizing that the permanent cessation of illegal conduct in response to a lawsuit is, in effect, a form of settlement for which fees may be awarded under *Maher v. Gagne*.

CONCLUSION

The decision of the court of appeals should be reversed, and the case remanded for a determination whether petitioners are entitled to fees under a catalyst theory.

Respectfully submitted,

BRIAN WOLFMAN
(Counsel of Record)
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
125 Broad Street
New York, NY 10004
(212) 549-2500

ARTHUR B. SPITZER
ACLU OF THE
NATIONAL CAPITAL AREA
1400 20th Street, NW
Washington, DC 20036
(202) 457-0800

HARVEY GROSSMAN
ADAM SCHWARTZ
ROGER BALDWIN FOUNDATION
OF ACLU, INC.
180 North Michigan Avenue
Chicago, IL 60601
(312) 201-9740

November 20, 2000

Supreme Court, U.S.
FILED
DEC 20 2000
CLERK

Dec 20, 2000

No. 99-1848

IN THE SUPREME COURT
OF THE UNITED STATES

BUCKHANNON BOARD AND CARE HOME, INC., ET AL., PETITIONERS
v.
WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, ET AL., RESPONDENTS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE ALLIANCE OF AUTOMOBILE MANUFACTURERS, INC. AMICUS CURIAE SUPPORTING RESPONDENTS

CHARLES A. NEWMAN
Counsel of Record
KATHY A. WISNIEWSKI
JEROME H. BLOCK
Bryan Cave LLP
One Metropolitan Square
Suite 3600
St. Louis, Missouri 63102
(314) 259-2000

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether, under a federal fee-shifting statute, attorneys' fees are recoverable when the plaintiff's claims did not result in a judgment, settlement, or consent decree?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF THE ALLIANCE 1

STATEMENT OF THE CASE 5

INTRODUCTION AND SUMMARY OF THE ARGUMENT 6

ARGUMENT 8

I. IT IS PROBLEMATIC TO ALLOW FEES WITHOUT A JUDGMENT, CONSENT DECREE, OR SETTLEMENT. 9

II. EVEN IF UPHELD UNDER THE FHAA AND THE ADA, THE "CATALYST" THEORY DOES NOT APPLY UNDER ALL FEE-SHIFTING STATUTES. 17

III. "CATALYST" FEES SHOULD BE ALLOWED ONLY UNDER SPECIFIC STANDARDS. 22

CONCLUSION 26

TABLE OF AUTHORITIES

FEDERAL CASES

Aetna Casualty and Surety Co. v. Liebowitz,
730 F.2d 905 (2d Cir. 1984) 18

Alyeska Pipeline Service Co. v. Wilderness Society,
421 U.S. 240, 247 (1975) 4

Baumgartner v. Harrisburg Housing Authority,
21 F.3d 541 (3d Cir. 1994) 20

Brown v. Brotherhood of Electrical Workers,
76 F.3d 762 (6th Cir. 1996) 21

Chin v. Chrysler Corp.,
182 F.R.D. 448 (D.N.J. 1998) 10, 11, 15, 26

Chin v. Chrysler Corp.,
Civ. No. 95-5569-JCL (December 15, 1999)
..... 3, 10, 11, 12, 13, 15, 16, 19, 20, 26

Christiansburg Garment Co. v. Equal Employment Opportunity Commission,
434 U.S. 412 (1978) 2

Commissioners Court of Medina County v. United States,
683 F.2d 435 (D.C. Cir. 1982) 22

Davis v. Carl Cannon Chevrolet-Olds, Inc.,
182 F.3d 792 (11th Cir. 1999)..... 5, 7

Farrar v. Hobby,
506 U.S. 103 (1992)..... 9, 12, 16

Fogerty v. Fantasy, Inc.,
510 U.S. 517 (1994)..... 17, 18

Folsom v. Heartland Bank,
No. Civ. A. 98-2308,
2000 WL 718345 (D.Kan.2000) 19

Foreman v. Dallas County,
193 F.3d 314 (5th Cir. 1999)..... 25

Freightliner Corp. v. Myrick,
514 U.S. 280 (1995)..... 26

In re General Motors Corp. Pickup Truck Fuel Tank Products Liability Litigation,
46 F.Supp. 330 (E.D.Pa. 1993),
vacated on other grounds, 55 F.3d 768
(3d Cir. 1995)..... 2

Hall v. Cole,
412 U.S. 1 (1973)..... 21

Harris Trust and Savings Bank v. Salomon Smith Barney Inc.,
-- U.S. -- 120 S. Ct. 2180 (2000)..... 17

Hensley v. Eckerhart,
461 U.S. 424 (1983)..... 13

Klamath Siskiyou Wildlands Center v. Babbitt,
105 F. Supp. 2d 1132 (D.Or.2000)..... 18

Langton v. Johnston,
928 F.2d 1206 (1st Cir. 1991)..... 24

Marek v. Chesney,
473 U.S. 1 (1985)..... 8

Morris v. City of West Palm Beach,
194 F.3d 1203 (11th Cir. 1999)..... 22, 25, 26

Nadeau v. Helgemoe,
581 F.2d 275 (1st Cir. 1978)..... 25

Owner-Operator Independent Drivers Association, Inc. v. Bissell,
210 F.3d 595 (6th Cir. 2000); 25

S-1 v. State Board of Education of North Carolina,
6 F.3d 160 (4th Cir.1993),
rev'd, 21 F.2d 49 (4th Cir. 1994)..... 12, 14

Schwartz v. Folloder,
767 F.2d 125 16

Stomper v. Amalgamated Transit Union, Local 241,
27 F.3d 316 (7th Cir.1994)..... 18, 21

Walsh v. Ford Motor Co.,
130 F.R.D. 260, 267 (D.D.C. 1990) 2, 12

Wisnewski v. Champion Healthcare Corp.,
No. Civ. A3-96-72,
2000 WL 1474414 (D.N.D. 2000) 20, 21

Wood v. General Motors Corp.,
865 F.2d 395 (1st Cir. 1988),
cert denied, 494 U.S. 1065 (1990). 1

FEDERAL STATUTES AND RULES

49 C.F.R. § 501.1 2

49 C.F.R. § 501.2 2

49 C.F.R. § 552.3 3

49 C.F.R. § 554.1 2

49 C.F.R. § 554.5 3

49 C.F.R. § 554.10 3

49 C.F.R. § 554.11 ..... 3, 26

15 U.S.C. § 1640(a)(3) 19

15 U.S.C. § 2301, *et seq.* 4. 10, 19

15 U.S.C. § 2310(d)(2) 8, 11, 19, 20

16 U.S.C. § 1531, *et seq.* 19

29 U.S.C. § 201, *et seq.* 20

29 U.S.C. § 216(b) 8, 20

29 U.S.C. § 401, *et seq.* 21

42 U.S.C. § 1988 ..... 8, 16, 17, 18, 19, 20, 21

42 U.S.C. § 3613(c)(2) 5, 6

42 U.S.C. § 12205 ..... 5, 6

49 U.S.C. § 30101, *et seq.* 1

49 U.S.C. § 30111 2

49 U.S.C. § 30118 2

49 U.S.C. § 30118(a) 3

49 U.S.C. § 30118(b) 3, 26

49 U.S.C. § 30118(c) 3

49 U.S.C. § 30120(a)(1)(A) 2

Fed.R.Civ.P. 54 16

MISCELLANEOUS

Black's Law Dictionary (West 7th ed. 1999) 24

Hearing of the Courts and Intellectual Property Subcommittee of the House Judiciary Committee; Subject: Mass Torts and Class Action Lawsuits, statement of Richard Thornburgh, former Governor of Pennsylvania, Attorney General of the United States, and Under Secretary of the United Nations (March 9, 1998) 7

10 J.W. Moore, *Moore's Federal Practice,* § 54.101[3], 54-158 (3d ed. 2000) 16

Rand Institute for Civil Justice, *Class Action Dilemnas: Pursuing Public Goals for Private Gain Executive Summary 9 (1999)* 5

INTEREST OF THE ALLIANCE[1/]

The Alliance of Automobile Manufacturers, Inc. ("the Alliance")[2/] is a non-profit, national, trade association committed to improving motor vehicle safety. It serves as a leading advocacy group for the automobile industry on public policy matters. The members of the Alliance are subject to the Motor Vehicle Safety Act, 49 U.S.C. § 30101, *et seq.*, ("the Act"), which authorizes the Secretary of Transportation to commence proceedings related to alleged motor vehicle defects.[3/] The Act's sweeping provisions vest jurisdiction in the Secretary over all safety-related defects.

[1/]Letters from the parties consenting to the filing of this brief have been lodged with the Clerk of this Court pursuant to Rule 37.3. In compliance with Rule 37.6, the Alliance of Automobile Manufacturers, Inc. states that no counsel for a party has authored this brief in whole or in part, and that no person or entity other than the Alliance of Automobile Manufacturers, Inc. and its counsel has made a monetary contribution to the preparation of this brief.

[2/]The members of the Alliance manufacture and sell motor vehicles: BMW Group; DaimlerChrysler Corporation; Fiat Auto S.P.A.; Ford Motor Company; General Motors Corporation; Isuzu Motors America, Inc.; Mazda North American Operations; Mitsubishi Motor Sales of America, Inc.; Nissan North America, Inc.; Porsche Cars North America, Inc.; Toyota Motor North America, Inc.; Volkswagen of America, Inc.; and Volvo Cars of North America, Inc.

[3/]The National Traffic and Motor Vehicle Safety Act, recodified as the Motor Vehicle Safety Act, was passed by Congress in 1966 in response to the "soaring rate of death and debilitation on the Nation's highways." S.Rep. No. 1301, 89th Cong., 2d Sess. I, *reprinted in* 1966 U.S.C.C.A.N. 2709. The Act reflects Congress's "intention that the primary responsibility for setting standards regulating the national automobile manufacturing industry rested upon the federal government, not the states." *Wood v. General Motors Corp.*, 865 F.2d 395, 397 (1st Cir. 1988), *cert denied*, 494 U.S. 1065 (1990).

49 U.S.C. § 30111. The Act authorizes the Secretary to investigate and to determine whether any motor vehicle contains a defect, and, if it does, to require the manufacturer to "remedy such defect" by repairing the vehicle, replacing the vehicle, or refunding, less depreciation, the purchase price of the vehicle. 49 U.S.C. §§ 30118, 30120(a)(1)(A). The Secretary has delegated authority to effectuate the Act to the National Highway Traffic Safety Administration ("NHTSA"). 49 C.F.R. §§ 501.1, 501.2. NHTSA has the exclusive authority to enforce motor vehicle safety standards, to investigate possible safety-related defects, and to make non-compliance and defect determinations.[4/] 49 C.F.R. § 554.1.

Because of NHTSA's expertise in motor vehicle safety issues, courts considering civil claims alleging motor vehicle defects have invoked the doctrine of primary jurisdiction and deferred to that agency's expertise. *See, e.g., Walsh v. Ford Motor Co.*, 130 F.R.D. 260, 267 (D.D.C. 1990) (indicating that courts should "avoid entanglement with a regulatory scheme designed and intended to empower principally the Department of Transportation, rather than the courts, to order and oversee motor vehicle recalls"); *In re General Motors Corp. Pickup Truck Fuel Tank Products Liability Litigation*, 846 F.Supp. 330, 343-44 (E.D.Pa. 1993), *vacated on other grounds*, 55 F.3d 768 (3d Cir. 1995) (court refused to issue

[4/]While NHTSA is the "chosen instrument" for investigating and remedying vehicle defects, a civil plaintiff is "the chosen instrument of Congress" to enforce civil rights statutes. *Christiansburg Garment Co. v. Equal Employment Opportunity Commission*, 434 U.S. 412, 418 (1978). This distinction, in and of itself, clearly counsels against a uniform interpretation of all federal fee-shifting statutes to allow for "catalyst" fees.

injunctive relief ordering manufacturer to recall vehicles because "NHTSA, rather than the court, provides the more appropriate forum for any possible recall/retrofit remedy"). Even absent any court involvement, however, vehicle manufacturers are required to cooperate fully with NHTSA's Office of Defect Investigation ("ODI"), which is responsible for conducting investigations concerning the "identification and correction of safety-related defects in motor vehicles." 49 C.F.R. § 554.5.

The ODI's investigations are public. First, the information compiled by the ODI can be easily accessed by the public at NHTSA's Internet site (www.nhtsa.dot.gov), which contains an "Investigations Database." Second, if the ODI makes an "initial decision" that a safety-related defect exists, it must publish notice of its determination in the federal register. 49 U.S.C. § 30118(a); 49 C.F.R. § 554.10. Third, if the vehicle manufacturer contests the ODI'S initial decision, the matter proceeds to a public hearing which may result in NHTSA's final determination and an order for a recall, if warranted.[5/] 49 U.S.C. § 30118(b); 49 C.F.R. § 554.11.

Although a private party (or that party's counsel) can petition NHTSA to commence a vehicle safety investigation and seek a recall, 49 C.F.R. § 552.3, few do. Rather, the publication of NHTSA's actions is often the starting gun for the race to the courthouse and the ensuing jockeying for lead plaintiffs' counsel status. For example, in *Chin v. Chrysler Corp.*, Civil Action No. 95-5569-JCL (D.N.J.) -- a

[5/]At any time during this process, a manufacturer may elect to initiate a voluntary recall. 49 U.S.C. § 30118(c).

nationwide putative class action alleging a motor vehicle defect -- plaintiffs' counsel are presently pursuing an award of "catalyst" attorneys' fees[6/] under the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, *et seq.*, based on a theory that they were the "catalyst" to the defendant's voluntary recall of the allegedly defective vehicle. The claim for "catalyst" fees is being pursued although: (1) a NHTSA investigation predated the civil action; (2) Chrysler announced and completed a voluntary recall of the affected vehicles; (3) plaintiffs' unsuccessfully sought an injunction to prevent the voluntary recall (although their complaint sought a recall); (4) some claims were dismissed by motion; (5) the court denied class certification; (6) the plaintiffs dismissed their remaining individual claims; and (7) the vast majority of the relief sought was never granted or accomplished.

This type of scenario is repeated all-too-often and aided substantially by the courts of appeal, (except for the Fourth Circuit). These judicially-enabled practices assault the "American Rule" -- a fundamental hallmark of our jurisprudence on attorney's fees -- which mandates that even a "prevailing litigant" not "collect a reasonable attorneys' fee from the loser" in the absence of a statute authorizing such an award. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 247 (1975).

[6/]As used herein, the "catalyst" theory and "catalyst" fees refer to attorneys' fees sought by plaintiffs' counsel when there has been neither a settlement of the case, nor a judgment or a consent decree entered on the merits of the plaintiff's claims.

The members of the Alliance seek to preserve their freedom to make decisions regarding the safety and satisfaction of their customers, without fear that they will incur "penalties" in the form of paying enormous "catalyst" attorneys' fees to attorneys who file strategically-timed lawsuits. Although this case directly involves only the attorneys' fee provisions of the Fair Housing Amendments Act and the Americans with Disabilities Act, 42 U.S.C. § 12205; 42 U.S.C. § 3613(c)(2), this case is important to the Alliance and its members who are all-too-often targets of catalyst claims under other federal fee-shifting statutes. Members of the Alliance face a mounting volume of class actions asserting that vehicles are defective, and seeking damages for "diminution in value," class certification and, of course, attorneys' fees. The "fuel" for these vehicle cases, despite the regulatory schema, is the expectation of class counsel that they can obtain a large award of "catalyst" fees. Indeed, the economic self-interest of many plaintiffs' counsel has been judicially noticed, *Davis v. Carl Cannon Chevrolet-Olds, Inc.*, 182 F.3d 792, 796 (11th Cir. 1999), and is especially pronounced in consumer class actions that are often "virtual-plaintiff" cases and attorney-driven. *See* Rand Institute for Civil Justice, *Class Action Dilemnas: Pursuing Public Goals for Private Gain Executive Summary* 9 (1999) ("When class action lawsuits are successful, they may yield enormous fees for attorneys . . . So, attorneys have substantial incentives to seek out opportunities for litigation, rather than waiting for clients to come to them").

STATEMENT OF THE CASE

After Petitioners (residents in a private care facility) filed a lawsuit challenging the validity of specified state

statutes relating to residential care facilities, the State of West Virginia amended the laws to delete the offending provisions. The State then sought an involuntary dismissal of Petitioners' claims on the ground that they were moot.

The attorneys for Petitioners then requested that the court enter an award of "catalyst" fees. Petitioners sought the fees under the fee-shifting provisions of the Fair Housing Amendments Act ("FHAA") and the Americans with Disabilities Act ("ADA"), both of which provide for an attorney fee award to a "prevailing party." 42 U.S.C. § 12205; 42 U.S.C. § 3613(c)(2). Petitioners argued that they "prevailed" in the litigation (even without a judgment, consent decree, or settlement) because, through the defendants' voluntary action, they obtained "all" of the relief they sought in their complaint.

The district court granted the defendants' motion to dismiss, finding that the Petitioners' claims were moot. The district court then denied Petitioners' request for attorneys' fees holding that a party who does not obtain relief through a formal judgment, consent decree, or settlement cannot be a "prevailing party" under the FHAA or the ADA. The Fourth Circuit Court of Appeals affirmed the district court's order on the attorneys' fee issue.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Allowing the recovery of "catalyst" fees in product liability cases -- in the absence of any formal judgment, consent decree, or settlement -- is fraught with mischief. And the problems inherent in allowing an award of "catalyst"

fees are exponentially greater in class-actions which are often nothing more than an "entrepreneurial" venture "created" to secure attorneys' fees. *See, e.g., Davis v. Carl Cannon Chevrolet-Olds, Inc.*, 182 F.3d 792, 796 (11th Cir. 1999) (noting that plaintiff class action lawyers are merely ""entrepreneurs' who take a case in the expectation of making money from it"); *Hearing of the Courts and Intellectual Property Subcommittee of the House Judiciary Committee; Subject: Mass Torts and Class Action Lawsuits*, statement of Richard Thornburgh, former Governor of Pennsylvania, Attorney General of the United States, and Under Secretary of the United Nations (March 9, 1998) (commenting that lawyers "have lately perverted the class action device into their own personal litigation lottery"). Would-be class counsel -- knowing that attorneys' fees are available under a "catalyst" theory even if they do not shepherd the litigation to a final conclusion -- are motivated to "create" lawsuits regarding matters that could be addressed without litigation, and to abandon those lawsuits when the time is most ripe for their own personal profitability. And, it is not unheard of for a majority of the fees sought by those attorneys (and thus the court's expenditure of resources) to be attributable to the actual pursuit of fees, rather than to the resolution of the claims made in the complaint. These persistent and all-too-common problems cry out for abolishment of any "catalyst" theory that would allow the recovery of attorneys' fees without a judgment, consent decree, or settlement.

If any "catalyst" theory is recognized that allows for the recovery of attorneys' fees in the absence of a judgment, settlement, or consent decree, it should be based only on a statute-by-statute analysis. A broad pronouncement could

render all of the more than 100 fee-shifting statutes found in federal law susceptible to such a "catalyst" theory. *See Marek v. Chesney*, 473 U.S. 1, 43-51 (1985). Some of the federal fee-shifting statutes contain language distinct from that found in statutes such as the FHAA and the ADA, and expressly provide that, in order to be entitled to an award of attorneys' fees, a party must first obtain an enforceable "judgment". *See, e.g.*, 15 U.S.C. § 2310(d)(2); 29 U.S.C. § 216(b). Neither Congress, nor the statutes, contemplated an award of attorneys' fees without a judgment, consent decree, or settlement.

Finally, a "catalyst" theory for recovery of attorneys' fees should be recognized, if at all, only when specific, stringent standards are met. A plaintiff who seeks such fees should be required to show that the defendant's voluntary acts have rendered the plaintiff's claims moot in their entirety, that the defendant would not have acted "but for" the plaintiff's filing of his lawsuit, and that the relief provided by the defendant would have been "required by law" if the plaintiff succeeded on his claims.

ARGUMENT

Virtually every federal fee-shifting provision requires that a plaintiff "prevail" in order to be entitled to an award of attorneys' fees. *See, e.g.*, 42 U.S.C. § 1988 ("the court, in its discretion, may allow the *prevailing party* . . . a reasonable attorney's fee" (emphasis added)); 15 U.S.C. § 2310(d)(2) ("[i]f a consumer *finally prevails* in any action . . . he may be allowed by the court to recover as part of the judgment" his reasonable attorneys' fees (emphasis added)). And, this

Court has made a clear and unequivocal pronouncement as to when a plaintiff can claim to have "prevailed" in a case:

> [T]o qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief *on the merits of his claim*. The plaintiff *must obtain an enforceable judgment* against the defendant from whom fees are sought, *or comparable relief through a consent decree or settlement*. Whatever relief the plaintiff secures must directly benefit him at the time of the judgment or settlement.

Farrar v. Hobby, 506 U.S. 103, 111 (1992) (citations omitted) (emphasis added).

Farrar precludes the notion that a plaintiff can be deemed to have "prevailed" without a judgment, settlement, or consent decree. *Id.* It would be an unwarranted and unreasonable extension of *Farrar* to sanction an award of fees without any of the prerequisites pronounced by this Court. All the more so, since most fee-shifting provisions are operative, either by their terms or interpretively, only in favor of a "prevailing party" which this Court has defined as including only those who obtain a judgment, settlement, or consent decree. Indeed, awarding attorneys' fees without a judgment, settlement, or consent decree is an invitation to federalize and prolong every case which can possibly be pled under any of the more-than-100 fee-shifting statutes.

I. IT IS PROBLEMATIC TO ALLOW FEES WITHOUT A JUDGMENT, CONSENT DECREE, OR SETTLEMENT.

Both Petitioners and their *amici* argue that an award of attorneys' fees under a "catalyst" theory should be recognized if a plaintiff merely "achieves" "some relief" and benefits from that relief, regardless of how the case at issue is disposed of. This boundless proposition is unworthy of adoption.

The many problems inherent in awarding "catalyst" fees are illustrated by the case of *Chin v. Chrysler Corp.*, Civil Action No. 95-5569-JCL (D.N.J.). In *Chin*, the sole remaining issue of "catalyst" fees has been before the court for more than one year.[7/] Filed as a putative nationwide class action on October 27, 1995, the *Chin* complaint alleged that certain Chrysler[8/] vehicles equipped with a Bendix 9 or 10 antilock braking system were "dangerously defective." *Chin*

[7/]The *Chin* case is one of several "catalyst" cases currently pending against members of the Alliance. It is discussed at length herein because it best highlights most of the problems inherent in a "catalyst" theory which would allow for the recovery of attorneys' fees even in the absence of a judgment, settlement, or consent decree. The court in *Chin* has already held that the "catalyst" theory is applicable to that case. *Chin v. Chrysler Corp.*, Civ. No. 95-5569-JCL (December 15, 1999) (The *Chin* opinion regarding the "catalyst" issue is unpublished, and is thus attached in the appendix hereto). The parties have continued to litigate whether the plaintiffs' claims were a "substantial cause" of the defendant's alleged "voluntary" conduct.

[8/]Chrysler Corporation is now known as DaimlerChrysler Corporation and is one of the thirteen automobile manufacturers represented by the Alliance.

v. Chrysler Corp., 182 F.R.D. 448, 451 (D.N.J. 1998). Plaintiffs' claims included, *inter alia*, breach of warranty under the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, *et seq.*, which contains a "fee-shifting" provision (*i.e.*, a consumer who "finally prevails" can recover attorneys' fees "as part of the judgment"). 15 U.S.C. § 2310(d)(2).

The filing of the *Chin* case came only after NHTSA had initiated an inquiry and investigation into the Bendix 10 antilock braking system.[9/] *Chin*, 182 F.R.D. at 451-52. After the filing of *Chin*, Chrysler, with the oversight of NHTSA, announced that it would voluntarily recall all vehicles equipped with Bendix 9 and 10 antilock braking systems.[10/] *Id.* The final voluntary recall (involving the Bendix 9 system) was announced in October, 1996. *Id.*, at 452.

Despite Chrysler's voluntary recalls, and NHTSA's oversight of them, the plaintiffs in *Chin* continued to prosecute their claims for two more years. 182 F.R.D. 448. The plaintiffs' counsel moved the court to certify a nationwide class of owners of Chrysler-manufactured vehicles equipped with the subject antilock braking systems. *Id.* It was only after the court denied the plaintiffs' request for certification that the plaintiffs' counsel decided to abandon all of their clients' claims, assert "victory" based on the recalls, and seek attorneys' fees under the "catalyst"

[9/]NHTSA's inquiry and investigation into the Bendix 9 antilock braking system was not instituted until after the filing of *Chin*.

[10/]The plaintiffs' counsel in *Chin* sought an injunction to preclude the voluntary recall, but the court denied their motion.

theory. *Chin v. Chrysler Corp.*, Civ. No. 95-5569-JCL (December 15, 1999) (Appendix A).

Chin is illustrative of at least four problems inherent in awarding "catalyst" fees absent a judgment, settlement, or consent decree: (1) the proliferation of litigation; (2) the prolonging of litigation; (3) the discouraging of voluntary corrective action; and (4) the lack of objective standards leading to inconsistent results.

Proliferation of litigation. Recognition of the "catalyst" theory would further encourage the immediate initiation of a lawsuit whenever a lawyer learns of a pending investigation by NHTSA or a voluntary investigation by a manufacturer. It would discourage lawyers -- and the consumers they purport to represent -- from seeking, or waiting for, a satisfactory outcome without litigation. As such, it frustrates the regulatory scheme enacted by Congress which entrusts NHTSA with primary jurisdiction for investigating and remedying alleged vehicle defects. *See, e.g., Walsh*, 130 F.R.D. at 267. A lawyer knows that running to the courthouse before a regulatory resolution is achieved will provide a basis upon which he can claim "victory." Witness *Chin*: an inquiry was started by NHTSA into an automotive defect; before the NHTSA investigation was completed and before NHTSA and Chrysler came to a resolution, a lawsuit was filed; plaintiff's counsel, after successive strategic failures, then claimed "victory" based on that recall, and sought fees arguing that they obtained "some relief" (even though that relief occurred in the context of the pending NHTSA investigation). *See also See S-1 v. State Board of Education of North Carolina*, 6 F.3d 160, 172 (4th Cir. 1993), *rev'd*, 21 F.2d 49 (4th Cir. 1994) (Wilkinson, J.

dissenting) (noting that the "catalyst theory provides incentives for filing marginal, even frivolous, lawsuits. Any change in conduct by the defendant, for whatever reason, may offer a promising payout to attorneys who file a complaint, whether or not that complaint has any ultimate legal merit").

Prolonging of litigation. The issues as to the propriety of an award of "catalyst" fees can survive long after the plaintiff's claims have been resolved. Courts become enmeshed in the quagmire of developing and reviewing a factual record to decide: whether the voluntary relief provided by the defendant is the equivalent of "some" of the relief originally sought by the plaintiff; whether the plaintiff benefited from that relief; whether the plaintiff's filing of a lawsuit was the cause of the defendant's voluntary action; and what amount of attorneys' fees is reasonable. These issues make for a case-within-a-case, and consume more judicial resources than were spent on the substantive issues of the plaintiff's claims -- a result that runs counter to this Court's prior admonishment that "[a] request for attorney's fees should not result in a second major litigation." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). This case is a prime example. Although it has been pending for more than four years, it is undisputed that the Petitioners' claims became moot seventeen months into the litigation; the last two years and six months (and still counting) have focused solely on Petitioners' counsel's claim to attorneys' fees under a "catalyst" theory. More time has been spent on the "catalyst" issue than on the substantive claims underlying the litigation. *See also Chin*, Civ. No. 95-5569-JCL (December 15, 1999) (Appendix) (unresolved issue of "catalyst" attorneys' fees pending over one year).

Discouraging voluntary corrective action. Once suit has been filed, the risk of an attorneys' fee award based on the value of the supposed "results" achieved poses a strong disincentive to voluntary remedial action. If a defendant will be confronted with a claim for thousands of dollars in attorneys' fees even if he voluntarily remedies a problem, he may conclude that the risk of such a payment outweighs the benefits of a voluntary corrective action. Thus, by discouraging voluntary action, the catalyst theory harms the very class of people that it purports to benefit. *See S-1*, 6 F.3d at 172 (Wilkinson, J. dissenting) (noting "catalyst" theory discourages voluntary action).

Lack of objective standards leading to inconsistent results. There are no objective standards to ensure consistent results if an award of "catalyst" fees is allowed based on a plaintiff obtaining "some relief." Take a typical case in which the relief sought in the complaint includes cessation of offensive conduct, remedial action to correct conditions resulting from that offensive conduct, compensatory damages, and punitive damages. If the defendant voluntarily ceases the offending conduct, and the plaintiff abandons all claims for remedial action and compensatory and punitive damages, one court is free to find the "some relief" standard is satisfied, while another court is free to find otherwise. This consequential problem is particularly evident in class actions when multiple claims are pending in different jurisdictions based on the same alleged product defect. And, even if an objective standard is applied to the "some relief" criteria so that it is mandated that a court find it is met so long as a plaintiff obtains even just one of the types of relief originally sought, the amount of the attorneys' fees to be

awarded is yet another issue which is not prone to any consistent result.

Other problems inherent in the "catalyst" theory, while less obvious, are equally compelling. A "catalyst" theory under which a plaintiff's attorney is entitled to fees if he shows that he obtained "some relief" sought in a complaint leaves that plaintiff's attorney with an inherent ethical conflict: should a client's arguably meritorious claims be sacrificed when a defendant provides "some relief" originally sought by the client in order to optimize his counsel's chance of recovering attorneys' fees? This dilemma becomes more pronounced the less likely the chance of obtaining any additional relief on the other claims because if the plaintiff's counsel continues to litigate the claims after the defendant provides "some relief" and ultimately loses on those claims, how could he ever claim to be a "prevailing" party? Again, *Chin* is illustrative. The *Chin* plaintiffs sought various types of relief, including a recall of the allegedly defective vehicles and compensatory damages for lost resale value. 182 F.R.D. at 451. The defendant voluntarily conducted a recall of the vehicles within months of the filing of the lawsuit, but the plaintiffs' counsel continued to prosecute their clients' claims (believing that those claims were not moot and that the plaintiffs were entitled to additional damages and relief). *Id.*, at 448. Only after the court denied class certification did the plaintiffs decide to abandon their claims through a voluntarily dismissal. *Chin v. Chrysler Corp.*, Civ. No. 95-5569-JCL (December 15, 1999) (Appendix A). The plaintiffs' counsel then opted to seek an award of attorneys' fees under the "catalyst" theory based on the voluntary recall conducted two years earlier. *Id.* But this strategy abandoned the individual claims of the named plaintiffs that the

plaintiffs' counsel apparently believed to be meritorious even after the recall.

Furthermore, in the context of class action litigation, an award of "catalyst" fees entered as to the claims of the putative class members is inherently unfair. It subjects a defendant to the payment of attorneys' fees on a class-wide basis while that defendant remains susceptible to ongoing litigation by putative class members whose claims are not barred because there has been no judgment, settlement, or consent decree extinguishing their claims. *See, e.g., Chin*, No. 95-5569-JCL (Appendix A) (voluntary dismissal taken as to named plaintiff only since class certification had been denied).

Finally, the notion of an award of "catalyst" fees is at odds with Fed.R.Civ.P. 54. When a plaintiff voluntarily dismisses his claims with prejudice the defendant is deemed to be the "prevailing party" under Rule 54(d)(1), and, as such, is entitled to an award of costs. *See, e.g., Schwartz v. Folloder,* 767 F.2d 125, 130-31; 10 J.W. Moore, *Moore's Federal Practice,* § 54.101[3], 54-158 (3d ed. 2000). But, a "catalyst" theory would permit a plaintiff to turn the "prevailing party" label on its head by requiring a defendant who is a "prevailing party" for purposes of costs to pay attorneys' fees under a notion that the plaintiff is the "prevailing party" under the applicable fee-shifting statute. Clearly, Congress did not intend for one party to "prevail" for purposes of costs and the other party to "prevail" for purposes of fees. See *Farrar,* 506 U.S. at 118 (O'Connor, J., concurring) (because 42 U.S.C. § 1988 authorizes fees "as part of the costs . . . when a court denies costs, it must deny

fees as well; if there are no costs, there is nothing for the fees to be awarded "as part of").

Thus, it is clear that there are numerous problems if "catalyst" fees are allowed without a judgment, settlement, or consent decree. These problems cry out for abolition of any "catalyst" theory that allows fees without a judgment, settlement, or consent decree.

II. EVEN IF UPHELD UNDER THE FHAA AND THE ADA, THE "CATALYST" THEORY DOES NOT APPLY UNDER ALL FEE-SHIFTING STATUTES.

Even though this case involves only the FHAA and the ADA, Petitioners and *amici* suggest that all of the more than 100 federal fee-shifting statutes should be treated uniformly. *See* Petitioners' Brief, p. 20; Brief for Public Citizen and the American Civil Liberties Union, pp. 3-5; *see also* Brief for the United States, p. 2 ("this case . . . will likely provide guidance on the availability of fees under a wide variety of federal fee-shifting statutes"). However, this Court's maxims for statutory interpretation clearly counsel that the issue of whether "catalyst" attorneys' fees are permitted is one of statutory interpretation which necessarily must "begin[] with the language of [each specific] statute." *Harris Trust and Savings Bank v. Salomon Smith Barney Inc.*, -- U.S. --, 120 S.Ct. 2180, 2191 (2000).

Indeed, this Court has recognized the need to analyze fee-shifting statutes individually, according to their own words and purposes. For example, in *Fogerty v. Fantasy, Inc.,* 510 U.S. 517, 523-24 (1994), this Court refused to interpret the fee-shifting provision in the Copyright Act

coextensively with 42 U.S.C. § 1988 because, although the provisions shared similar language, the "goals and objectives of the two Acts are likewise not completely similar." *Id.*, at 524; *see also, Stomper v. Amalgamated Transit Union, Local 241,* 27 F.3d 316, 318 (7th Cir. 1994) ("Any tendency to treat all attorneys' fees statutes as if they were insignificant variations on § 1988 was squelched by *Fogerty* . . . which holds that even a statute with the same text as § 1988 does not necessarily have the same meaning . . . Different statutes receive individual analysis, with principal focus on their language . . . "); *Aetna Casualty and Surety Co. v. Liebowitz,* 730 F.2d 905, 907-08 (2d Cir. 1984) ("Nothing in the statute's language indicates an intent to authorize an attorney's fee award . . . for a plaintiff's successfully negotiating a settlement of his claim").

Adoption of a statute-by-statute approach to the issue of "catalyst" fees is consistent with *Fogerty*, which noted that courts must be "mindful that Congress legislates against the strong background of the American Rule" (*i.e.* "unless Congress provides otherwise, parties are to bear their own attorneys' fees"). 510 U.S. at 533. And, such an approach assures that Congressional intent will be honored and that litigants will be able to rely on the plain-language of a particular fee-shifting statute when that language is clear.

A disturbing trend has emerged. Courts, relying solely on cases interpreting civil rights statutes, have been extending the catalyst "theory" well beyond its civil rights roots without any analysis of the specific fee-shifting provision at issue. *See, e.g., Klamath Siskiyou Wildlands Center v. Babbitt,* 105 F.Supp.2d 1132, 1135 (D.Or. 2000) (without analysis of wording of statute at issue, and relying

exclusively on cases interpreting civil rights statutes as allowing the recovery of attorneys' fees under a "catalyst" theory, court held "catalyst" theory was viable under the Endangered Species Act, 16 U.S.C. § 1531, et seq. (*citing Sablan v. Dept. of Finance of the Commonwealth of the Northern Mariana Islands,* 856 F.2d 1317 (9th Cir. 1988))); *Folsom v. Heartland Bank,* No. Civ. A. 98-2308, 2000 WL 718345 *2 (D.Kan. 2000) (court concluded that, because plaintiffs were "prevailing parties" as interpreted in cases applying the fee-shifting provisions of 42 U.S.C. § 1988, they were entitled to an award of "catalyst" fees under the Truth-in-Lending Act fee-shifting provision, 15 U.S.C. § 1640(a)(3), even though the words "prevailing party" appear nowhere within the provisions of that Act (*citing Ellis v. University of Kansas Medical Center,* 163 F.3d 1186, 1194 (10th Cir. 1999); *Foremaster v. City of St. George,* 882 F.2d 1485, 1488 (10th Cir. 1989))). The moral weight and imperatives of many compelling civil rights cases have often led a court to award "catalyst" fees in a vastly different statutory scheme, without regard to the specific language of the statute at issue or the intent behind it.

Take, for example, the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301, *et seq.*, a statute of particular interest to the Alliance. The fee-shifting provision of that Act provides that "[i]f a consumer *finally* prevails in any action . . . he may be allowed by the court to recover *as part of the judgment*" his reasonable attorneys' fees. 15 U.S.C. § 2310(d)(2) (emphasis added). Despite the statutory language requiring a party to "finally" prevail before being awarded attorneys' fees, and the express statutory language indicating that attorneys' fees can only be recovered as "part of the judgment," the court in *Chin v. Chrysler Corp.*, Civ. No. 95-

5569-JCL (December 15, 1999) (Appendix A), held that the Magnuson-Moss Act permits recovery of "catalyst" fees even when a plaintiff voluntarily dismisses his claims. In reaching its conclusion, the court relied heavily on *Baumgartner v. Harrisburg Housing Auth.*, 21 F.3d 541 (3d Cir. 1994) -- a case holding that the "catalyst theory" applies to 42 U.S.C. § 1988. *Id.* Yet, the Magnuson-Moss Act, unlike 42 U.S.C. § 1988, precludes an award of attorneys' fees in the absence of an enforceable "judgment" of which attorneys' fees can be made a "part." 15 U.S.C. § 2310(d)(2). And, the Magnuson-Moss Act, unlike 42 U.S.C. § 1988, requires the plaintiff to "*finally* prevail[]" in the lawsuit. 15 U.S.C. § 2310(d)(2) (emphasis added). Taking § 2310(d)(2) on its face, nothing short of a final judgment (*i.e.*, a "judgment" in which the plaintiff "finally prevails") could support an award of attorneys' fees under the Magnuson-Moss Act; yet, relying on civil rights cases, the *Chin* court found that a "catalyst" theory applied.

The members of the Alliance, like other employers, are also subject to the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.* It provides that a court must "in addition to any *judgment* awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee . . . " 29 U.S.C.§ 216(b) (emphasis added). Notwithstanding the fact that this fee-shifting provision explicitly indicates that an award of any attorneys' fees is to be made only as an "addition to any *judgment*," the court in *Wisnewski v. Champion Healthcare Corp.*, No. Civ. A3-96-72, 2000 WL 1474414 *8 (D.N.D. 2000), held that a plaintiff can recover attorneys' fees under a "catalyst" theory even without a judgment. Indeed, the *Wisnewski* court expressly acknowledged that the plaintiffs in that case had "not received actual relief on the merits of their claim

through a judgment, consent decree, or settlement." 2000 WL 1474414 *9. Nonetheless, the court made an award of attorneys' fees to the plaintiffs' counsel on the basis of the defendant's "voluntary" act of correcting its formula for the computation of overtime. 2000 WL 1474414 *10. The court in *Wisnewski* did not analyze the "in addition to any *judgment*" language of the Fair Labor Standards Act, but, rather, relied solely on cases interpreting a civil rights statute -- 42 U.S.C. § 1988. *Id.*, at *8-9 (*citing Tyler v. Corner Constr. Corp.*, 167 F.3d 1202, 1205 (8th Cir. 1999)).

Many Alliance members are also covered by the provisions of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 401, *et seq.* ("LMRDA"). The expansion of the "catalyst" theory, without careful consideration of the statutory provision at issue, is nowhere more clear than in the cases interpreting the LMDRA. Although one court has held that Title II of the LMRDA prohibits an award of "catalyst" attorneys' fees because its express language indicates that fees are to be awarded only "in addition to any *judgment*," *Stomper v. Amalgamated Transit Union, Local 241*, 27 F.3d 316, 318-20 (7th Cir. 1994) (emphasis added), another has held that the "catalyst" theory applies to Title I of the LMRDA, *even though that part of the statute has no fee-shifting provision, whatsoever. Brown v. Brotherhood of Electrical Workers*, 76 F.3d 762, 770-71 (6th Cir. 1996). Relying on this Court's pronouncement in *Hall v. Cole*, 412 U.S. 1, 9 (1973), authorizing a court to use its "equitable power" to shift fees under Title I of the LMRDA to a prevailing union member whose lawsuit produces a "common benefit" for the union members at large, the court in *Brown* determined that, in a Title I LMRDA action, a plaintiff need not prevail on the

merits for such fee-shifting to occur. The court based its analysis solely on case law finding that "catalyst" fees are available in civil rights cases, despite the fact that there is a complete absence of any statutory authority for such fees within the LMRDA. 76 F.3d at 770 (*citing Hewitt v. Helms*, 482 U.S. 755, 760 (1987); *Maher v. Gagne*, 448 U.S. 122, 129 (1980)).

As these cases document, there is a near-cavalier attitude toward expanding the "catalyst" theory to all fee-shifting statutes without regard to, and indeed in spite of, express statutory language.

III. "CATALYST" FEES SHOULD BE ALLOWED ONLY UNDER SPECIFIC STANDARDS.

If this Court determines that "catalyst" fees are recoverable without a judgment, settlement, or consent decree, it should set forth specific, stringent standards for determining when such fees will be awarded. The standards currently applied vary from circuit to circuit producing inconsistent results. *Compare, e.g., Morris v. City of West Palm Beach,* 194 F.3d 1203, 1210 (11th Cir. 1999) (requiring three elements: (1) the plaintiff achieved "substantial success" in which there has been a "material alteration of the legal relationship of the parties"; (2) the lawsuit was a "substantial factor" in obtaining the relief; and (3) the defendant's voluntary remedial action would have been "required by law") *with Commissioners Court of Medina County v. United States,* 683 F.2d 435, 442 (D.C. Cir. 1982) (requiring just two elements: (1) the plaintiff "substantially received the relief sought"; and (2) the lawsuit was a "substantial factor in attaining the relief").

The Alliance suggests a tripartite test to determine whether a party is entitled to an award of "catalyst" fees: (1) the plaintiffs' claims must be completely moot, and thus lack any legal basis; (2) the plaintiff must prove that "but for" the filing of the lawsuit, the defendant would not have taken the remedial action; and (3) the plaintiff must show that the remedial action would have been "required by law" if he had succeeded on the merits of his claims.

First, a plaintiff should be required to show that the defendant's action rendered the plaintiff's lawsuit moot in its entirety, and that he thus has no legal basis to pursue any of the claims filed against the defendant.[11/] Without a showing of complete mootness, the "catalyst" theory is inapplicable because the plaintiff's claims can still be adjudicated thereby clearly answering the "prevailing party" question. Further, requiring a finding of mootness lessens the ethical dilemmas inherent in a system that would allow a plaintiff's meritorious claims to be abandoned in favor of seeking immediate "catalyst" fees. In short, the "catalyst" theory should not apply unless the defendant's voluntary remedy puts the plaintiff out of court.

[11/]Such a requirement is implicitly acknowledged by Petitioners and their *amici*. *See, e.g.*, Petitioners' Brief, p. 18 (arguing that the plaintiff is entitled catalyst attorneys' fees "*when a case is rendered moot* as a result of the plaintiff catalyzing the defendant into making changes consistent with the relief requested by the plaintiff" (emphasis added)); Brief for the United States, p. 20 (arguing that the plaintiff is entitled to catalyst attorneys' fees when the defendant "voluntarily complies with the plaintiff's demand for relief[,] *eliminates the basis for the plaintiff's legal challenge, moots the plaintiff's legal action*, and relieves the parties of their obligation to litigate the suit" (emphasis added)).

Second, the plaintiff must bear the burden to prove that the defendant would not have taken the remedial action "but for" the plaintiff's lawsuit. This standard was aptly characterized in *Langton v. Johnston,* 928 F.2d 1206, 1224-25 (1st Cir. 1991):

> The catalyst test . . . is invoked in those cases in which plaintiffs do not receive a favorable judgment, yet claim to have succeeded in bringing about a beneficial change in defendants' conduct or in the conditions complained of -- a change which would not have occurred *but for* the institution of the suit. The critical inquiry is whether the suit prompted defendants to take action to meet plaintiff's claim . . . In this inquiry, the litigation's provocative role is a *sine qua non*[12/] . . . If the defendant acted other than in response to the spur of plaintiffs' lawsuit, the catalyst theory does not apply.

(emphasis added) (internal quotations and citations omitted) (*interpreting Nadeau v. Helgemoe,* 581 F.2d 275 (1st Cir. 1978)[13/]).

[12/]A "but for" test contemplates that the plaintiffs' lawsuit is the *sine qua non* for the defendant's voluntary action. *See Black's Law Dictionary* (West 7th ed. 1999) (defining *sine qua non* as an "indispensable condition or thing; something on which something else necessarily depends").

[13/]The standards set forth in *Nadeau* have been cited, with approval, by Petitioners.

Allowing the recovery of "catalyst" fees under a lesser standard will act as a strong incentive to litigate first and to attempt to preempt regulatory processes. Only a "but for" standard will act to protect defendants who act in good-faith in response to expressed customer concerns or government regulation. Only a "but for" standard provides the "safe harbor" necessary to ensure that defendants will feel free to act without the fear that a huge attorneys' fee payment looms.[14/]

Third, the plaintiff should be required to show that the remedial action would have been "required by law" had the plaintiff succeeded on the merits of the lawsuit. *See, e.g., Owner-Operator Independent Drivers Association, Inc. v. Bissell,* 210 F.3d 595, 598 (6th Cir. 2000) (if the voluntary relief "is not required by law, then defendants must be held to have acted gratuitously and plaintiffs have not prevailed in a legal sense" (citations omitted)); *Foreman v. Dallas County,* 193 F.3d 314, 322 (5th Cir. 1999) ("A defendant cannot be asked to pay attorneys' fees for relief which was never demanded, or even made clear, in the plaintiff's complaint"); *Morris v. City of West Palm Beach,* 194 F.3d 1203, 1210 (11th Cir. 1999) ("The third element of the catalyst test has been expressed as requiring a showing that the defendant's conduct was required by law" (quotations and citations omitted); *Nadeau v. Helgemoe,* 581 F.2d 275, 281 (1st Cir. 1978) (indicating that a plaintiff does not

---

[14/]The "substantial factor" approach suggested by Petitioners and their *amici* fails to address such concerns because it permits the recovery of attorneys' fees, even if the plaintiff's lawsuit was not a *sine qua non* (*i.e.* an indispensable condition) to defendant's voluntary remedial action.

"prevail" for purposes of a fee award under the "catalyst" theory if the defendant's voluntary conduct "is not required by law").

This third essential element assures that plaintiffs will "not be deemed to be prevailing parties if their claims are objectively unmeritorious." *Morris*, 194 F.3d at 1210. And, in the context of the automotive industry, the adoption of the "required by law" element will minimize the number of unnecessary lawsuits that are filed after publication of NHTSA regulatory efforts.[15/]

CONCLUSION

This Court should affirm the decision of the Fourth Circuit Court of Appeals.

[15/]For example, in *Chin* the plaintiffs asserted entitlement to attorneys' fees based on the defendant's voluntary "recall" of allegedly defective automobiles, one of the many types of relief listed as being "sought" in their civil complaint. *Chin v. Chrysler Corp.*, 182 F.R.D. 448, 451 (D.N.J. 1998); *Chin v. Chrysler Corp.*, Civ. No. 95-5569-JCL (December 15, 1999) (Appendix A). However, because the exclusive authority to order recalls lies with NHTSA, (49 U.S.C. § 30118(b); 49 C.F.R. § 554.11; *see also Freightliner Corp. v. Myrick*, 514 U.S. 280, 283-84 (1995)), the district court could never have granted such relief.

Respectfully submitted,

CHARLES A. NEWMAN
Counsel of Record
KATHY A. WISNIEWSKI
JEROME H. BLOCK
Bryan Cave LLP
One Metropolitan Square
Suite 3600
St. Louis, Missouri 63102
(314) 259-2000

APPENDIX

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

DAVID CHIN, ET AL.,	:	
	:	Civ.No.95-5569 (JCL)
PLAINTIFFS,	:	
	:	
v.	:	
	:	**MEMORANDUM AND**
CHRYSLER CORPORATION,	:	**ORDER**
	:	
DEFENDANT.	:	

LIFLAND, District Judge

Presently before the Court is plaintiffs' appeal of Magistrate Judge Chesler's August 24, 1999 Order denying plaintiffs' motion for a declaration of their right to attorneys' fees. Also before the Court are plaintiffs' motion for further discovery and defendant's motion to strike the declaration of Clarence Ditlow. For the reasons discussed herein, the Magistrate Judge's Order will be reversed, plaintiffs' motion for discovery will be granted, and defendant's motion to strike will be denied.

BACKGROUND

Plaintiffs brought this action on behalf of themselves and other buyers and lessees of Chrysler cars and trucks employing Bendix 9 and 10 anti-lock brakes, alleging violations of the Magnuson-Moss act, 15 U.S.C. § 2301 et seq., ("the Act" or "Magnuson-Moss") and state laws governing fraud and breach of warranty. Plaintiffs' motion

for class certification was denied by this Court on September 11, 1998. See Chin v. Chrysler Corp., 182 F.R.D. 448 (D.N.J. 1998) (providing a more complete account of the facts preceding the present appeal and motions). This Court then granted plaintiffs' motion to dismiss pursuant to FRCP 41(a)(2).

Plaintiffs appeal Magistrate Judge Chesler's determination that they are not entitled to attorneys' fees as the party that finally prevail[ed]" in accordance with the fee-shifting provisions of the Act. See 15 U.S.C. § 2310(d)(2). Magistrate Judge Chesler found that the Act requires a party to litigate its claim to finality before it may be considered a prevailing party entitled to attorneys' fees. Applying a plain meaning analysis to the statutory words, the Magistrate Judge determined that the words "finally prevails" in the Act differentiate it from other fee-shifting statutes that allow a broad interpretation of "prevailing party" and do not require a party to litigate his claims to a resolution on the merits to be eligible for attorneys' fees. Under many statutes using "prevailing party" language, court have ruled that a party may recover attorneys' fees even if it did not win the case, if the party can demonstrate that its lawsuit was a catalyst that brought about the desired relief. Under this "catalyst theory," a party may recover attorneys fees even if it dropped its claim because the lawsuit had been mooted by voluntary action taken by the other party. The party seeking attorneys' fees must demonstrate that it received relief that it originally sought and that there was a causal connection between the lawsuit and attainment of that relief.

Having determined the catalyst theory inapplicable, the Magistrate Judge did not reach the merits of the factual dispute as to whether plaintiffs' lawsuit was a catalyst for

Chrysler's recall of vehicles with the Bendix 9 and 10 anti-lock braking systems or whether that recall was due to an investigation by the National Highway Traffic Safety administration ("NHTSA") or to other factors.

Plaintiffs argue that the catalyst theory is viable under the Act and request additional discovery from defendant to prove that their lawsuit was a catalyst for Chrysler's recall of vehicles employing the Bendix 9 and 10 anti-lock braking systems, which was part of the relief originally sought in their lawsuit. Defendant argues that Magistrate Judge Chesler was correct in determining that the catalyst theory is not available under the Act that that plaintiffs, having been denied class certification and seeking voluntary dismissal of their lawsuit, cannot be said to have finally prevailed.

STANDARD OF REVIEW

The court may reverse a magistrate's order only if it finds the ruling clearly erroneous or contrary to law. See 28 U.S.C. § 636(b)(1)(A); Fed. R. Civ. P. 72(a); L. Civ. R. 72.1(c)(1)(A). The district court is bound by the clearly erroneous rule in findings of fact, while the phrase "contrary to law" indicates plenary review as to matters of law. See Haines v. Liggett Group Inc., 975 F.2d 81, 91 (3d Cir. 1992). When an appellant challenges a magistrate's interpretation of specified statutory language, the court's standard of review is plenary. See United States v. Hayden, 64 F.3d 126, 129 (3d Cir. 1995); United States v. Accetturo, 623 F. Supp. 746, 753 (D.N.J. 1985). Because Magistrate Judge Chesler's opinion turned on statutory interpretation, this Court's review is plenary.

DISCUSSION

1. The Statute's Terms

Magnuson-Moss authorizes lawsuits for damages or other legal or equitable relief by any "consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under this chapter, or under a written warranty, implied warranty, or service contract." 15 U.S.C. § 2310(d)(1). Regarding recovery of attorneys' fees, the Act states:

> If a consumer finally prevails in any action brought under [15 U.S.C. § 2310(d)(1)], he may be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of cost and expenses (including attorneys' fees based on actual time expended) determined by the court to have been reasonably incurred by the plaintiff for or in connection with the commencement and prosecution of such action, unless the court in its discretion shall determine that such an award of attorneys' fees would be inappropriate.

15 U.S.C. § 2310(d)(2).

The legal issue is whether Congress' use of the terms "as part of the judgment," "prevails," and "finally" in the Act's fee-shifting provision permits the court to apply the catalyst theory to award attorneys' fees. The question is a matter of first impression. If the catalyst theory is available, then the factual question remains: whether this action was a catalyst for Chrysler's recall.

The paramount canon of statutory interpretation is that a court must first direct its inquiry to the statute's actual language. See Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992); Smith v. Fidelity Consumer Discount Co., 898 F.2d 907, 909-10 (3d Cir. 1990). Where the statutory language is clear on its fact, a court must give it full force and effect. See United States v. Menasche, 348 U.S. 528, 520 (1955) (citations omitted). Absent a clear meaning, a court may seek the meaning of the statutory terms by looking to other statutes with similar language, legislative purposes, and underlying policies and may analogize to the meaning given by courts interpreting those statutes. See Brown v. Gardner, 513 U.S. 115, 118-19 (1994). The court also may seek the legislative intent of the statutes from its legislative history, the policies underlying the statute, reasonableness, and public policy concerns. See Blanchard v. Bergeron, 489 U.S. 87, 91 (1989); Montana Wilderness Assoc. v. United States Forest Serv., 665 F.2d 951, 955-57 (9th Cir. 1981). The interpretation ultimately accorded to a statute's terms must be given in a common sense manner that advances the legislative purposes of the statute. See United States v. Brown, 333 U.S. 18, 25-26 (1948) ("The canon in favor of strict construction is not an inexorable command to override common sense and evident statutory purpose. It does not require magnified emphasis upon a single ambiguous word in order to give it a meaning contradictory to the fair import of the whole remaining language."); Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 255 (1992) (Stevens, J., concurring) (quoting Judge Learned Hand's opinion in Lehigh Valley Coal Co. v. Yensavage, 218 F. 547, 553 (2d Cir. 1914) advising that statutes "should be construed, not as theorems of Euclid, but with some imagination of the purposes which lie behind them.").

a) "As part of the judgment"

The Act's fee-shifting provision states that a consumer may recover attorneys' fees "as part of the judgment." Many courts have ruled that a final adjudication of the merits of the case is not required to trigger the provision. For example, a plaintiff who accepts a settlement offer can be considered a "prevailing party" entitled to attorneys' fees under Magnuson-Moss. See McGinty v. Sunbird Boat Co., Inc., 1998 WL 544953 (E.D. Pa. Aug. 26, 1998) (plaintiffs who settled for a replacement for defective boat may still be the prevailing party); Anderson v. Ford Motor Co., 1997 WL 158133, at *1 (E.D. Pa. Apr. 1, 1997); Allen v. Chrysler Corp., 1997 WL 117015, at *1 (E.D. Pa. Mar. 13, 1997); Rivera v. Ford Motor Co., 1996 W.L. 383306, at *1 (E.D. Pa. July 3, 1996); Ianelli v. Chrysler Corp., 1996 WL 368317, at *1 (E.D. Pa. June 24, 1996); Stitsworth v. Ford Motor Co., 1996 WL 67610, at *1 (E.D. Pa. Feb. 13, 1996) ("A party accepting a settlement offer may be considered the 'prevailing party.'"); Taylor v. Chrysler Corp., 1995 WL 635195, at *1 (E.D. Pa. Oct. 24, 1995); DeVries v. Pitts Pontiac GMC-Trucks, Inc., 545 N.Y.S.2d 1009, 1013 (City Ct., Monroe Co. 1989) (legislative history indicates that a settling consumer can be the "prevailing party").

Furthermore, a plaintiff who accepts an arbitration award can be a prevailing party eligible for attorneys' fees under the Act. See Elder v. Chrysler Corp., 1997 WL 734036 (E.D. Pa. Nov. 5, 1997). Such is the case even if the plaintiff achieved only limited success in the arbitration, although the limited degree of success may decrease the total amount of the attorneys' fees award. See Hines v. Chrysler Corp., 971 F. Supp. 212, 214 (E.D. Pa. 1997) ("Although plaintiff only achieved limited success at the arbitration of

this matter, she is still considered a 'prevailing party' for purposes of the Magnuson-Moss Act and may be entitled to attorneys' fees."); Gibbs v. Hyundai Motor Am., 1997 WL 325788 (E.D. Pa. June 4, 1997).

The New Jersey courts have allowed consumers accepting rescission as to a faulty product to recover attorneys' fees as a prevailing party under the Act even in the absence of a judgment for any damages. See Ventura v. Ford Motor Corp., 173 N.J. Super. 501 (Ch. Div. 1980), aff'd 180 N.J. Super. 45 (App. Div. 1981). The New Jersey courts have focused on whether consumers received any relief rather than on the amount received when awarding attorneys' fees under the Act, holding that a limited amount of damages does not necessarily limit the fees to be awarded to a prevailing party. See General Motors Acceptance Corp. v. Jankowitz, 230 N.J. Super. 555 (App. Div. 1989). These cases have underscored that the trial judge is not "slavishly bound under Magnuson-Moss" when considering whether and to what degree to award attorneys' fees, but may award attorneys' fees to the party who has "properly sought and received relief" under the Act regardless of whether a damages award was entered. See id. at 560.

Thus, courts that have considered the issue have found that litigating a case to trial is not required. Rather, a consumer who obtains a settlement or even a partial victory through arbitration can still be said to have prevailed sufficiently to warrant attorneys' fees. Such an interpretation is consistent with the legislative history of the Act. See Senate Committee on Commerce, Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, S. Rep. 93-151, at 22-24 (1973) (discussing the private remedies available under the Act, particularly "reasonable

attorney's fees available if successful in the litigation (including settlement)").

In the cases discussed above, the courts did not resolve the merits of the claims, but they did enter judgments involving either settlement, an arbitration award, or rescission of the contract. In most of these cases, attorneys' fees were awarded "as part of the judgment" in accordance with the Act. The Court finds that it is not necessary for a Magnuson-Moss plaintiff to receive a damages award or to litigate to a decision on the merits of its claim in order to be eligible for attorneys' fees as part of a judgment. A dismissal of a lawsuit and a court-ordered award of attorneys' fees would be a judgment that is both enforceable and appealable. The Court has already dismissed plaintiffs' claims in the present matter. If the Court were to find after discovery on the catalyst issue that an award of attorneys' fees is warranted, it would enter a judgment awarding such fees. That would be sufficient to meet the Act's requirement that fees be awarded "as part of the judgment."

b) "Prevails"

What it means to "prevail" has a broad meaning under many fee-shifting statutes, with a great many courts finding under the catalyst theory that a party can still be said to prevail even if his cause of action has been mooted by some voluntary action of the opposing party. For example, the fee-shifting statute applicable to federal civil rights claims, 42 U.S.C. § 1988, provides that "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988(b). Courts interpreting the term "prevailing party" in § 1988 have construed it to include

parties who prevail through settlement. See, e.g., Maher v. Gagne, 448 U.S. 122, 129 (1980) ("The fact that respondent prevailed through a settlement rather than through litigation does not weaken her claim to fees."). Courts applying the catalyst theory have found that civil rights litigants have prevailed "if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." See Hensley v. Eckerhart, 461 U.S. 424, 433 (1983); see also Hewitt v. Helms, 482 U.S. 755, 760 (1987) ("[R]elief need not be judicially decreed in order to justify a fee award under §1988."). The Supreme Court explained the jurisprudential underpinnings of the catalyst theory in Hewitt v. Helms, in which it noted:

> [a] lawsuit sometimes produces voluntary action by the defendant that affords the plaintiff all or some of the relief he sought through a judgment - e.g., a monetary settlement or a change in conduct that redresses the plaintiff's grievances. When that occurs, the plaintiff is deemed to have prevailed despite the absence of a formal judgment in his favor. . . . In all civil litigation, the judicial decree is not the end but the means. At the end of the rainbow lies not a judgment, but some action (or cessation of action) by the defendant that the judgment produces - the payment of damages, or some specific performance, or the termination of some conduct.

482 U.S. at 760-01.

The Third Circuit has specifically adopted the catalyst theory in civil rights cases. See Baumgartner v. Harrisburg Housing Auth., 21 F.3d 541 (3d Cir. 1994); Institutionalized Juveniles v. Secretary of Pub. Welfare, 758 F.2d 897, 910

(3d Cir. 1985); Sullivan v. Commonwealth of Pa. Dept. of Labor & Indus., 663 F.2d 443, 452 (3d Cir. 1981). Of relevance to the present motion, the Third Circuit in Baumgartner found that the catalyst theory could apply even in a case in which plaintiffs did not litigate their claims to completion but voluntarily dismissed the case, as long as plaintiffs could prove that their lawsuit accomplished its objectives. See Baumgartner, 231 F.3d at 545. The Baumgartner court noted that the Supreme Court has held that a "catalyst" plaintiff cannot recover attorneys' fees based on a purely moral victory but must secure some enforceable judgment, and then held that the catalyst theory could still apply in a case in which a plaintiff did not seek solely money damages and realized significant benefits sought by the lawsuit. See id. at 545-46 (citing Farrar v. Hobby, 506 U.S. 103, 112 (1992)). The Third Circuit recognized the continuing viability of the catalyst theory, noting that all the circuit courts to have considered the theory's applicability under prevailing party statutes have adopted it. See id. at 544-45 ("This firmly-entrenched doctrine has also been recognized by each of the other eleven courts of appeals to have considered the issue.") (citing cases from each circuit).

Not all fee-shifting provisions are alike and the case law history of the civil rights statute's attorney-fee provision is not applied across the board. See Stomper v. Amalgamated Transit Union, Local 241, 27 F.3d 316, 318 (7th Cir. 1994). ("Any tendency to treat all attorneys' fees statutes as if they were insignificant variations on § 1988 was squelched by Fogerty v. Fantasy, Inc., 510 U.S. 517 (1994), which holds that even a statute with the same text as § 1988 does not necessarily have the same meaning. . . . Different statutes receive individual analysis, with principal focus on their language."). But several other federal statutes that provide

that the party who prevails may recover attorneys' fees have been interpreted to embrace the catalyst theory. Accordingly, the Court will review the language of various attorney-fee provisions to determine whether those statutes are interpreted to support the catalyst theory.

The catalyst theory has been applied to the fee-shifting provision of the Individuals with Disabilities Education Act ("IDEA"), which allows attorneys' fees the "parents or guardian of a child or youth with a disability who is the prevailing party." See Kathleen H. v. Massachusetts Dep't of Educ., 154 F.3d 8, 14 (1st Cir. 1998) (quoting 20 U.S.C. § 1415(e)(4)(B)); B.K. v. Toms River Bd. of Educ., 998 F. Supp. 462, 474 (D.N.J. 1998); Cf. Combs v. School Bd. of Rockingham County, 15 F.3d 357, 361 (45th Cir. 1994) (finding plaintiff not entitled to fees, but leaving open whether fees are recoverable under catalyst theory absent judgment, consent decree, or settlement).

The Third Circuit has applied the catalyst theory to the Education of the Handicapped Act ("EHA"), which allows a court to "award reasonable attorney's fees as part of the costs to the parents or guardian of a handicapped child or youth who is the prevailing party." Wheeler v. Towanda Area Schl. Dist., 950 F.2d 128, 132 (3d Cir. 1991) (quoting 20 U.S.C. § 1415(e)(4)(B)).

The catalyst theory also has been applied under the Equal Access to Justice Act ("EAJA"). See Dunn v. Sullivan, 794 F. Supp. 133, 135, 137 (D. Del. 1992). The EAJA states that a court may award reasonable attorneys' fees to "the prevailing party in any civil action brought by or against the United States . . . . " See 28 U.S.C. § 2412(b). Of relevance, the catalyst theory was applied in Dunn v.

Sullivan to Social Security benefits claimants seeking attorneys' fees under EAJA even after their lawsuit had been dismissed as moot. See Dunn, 794 F. Supp. at 135 (finding that a dismissal is a "final judgment" under EAJA and can entitle a prevailing party to recover attorneys' fees).

The catalyst theory has also been applied to the Fair Housing Act ("FHA"), which states that "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs." 42 U.S.C. §3613(c)(2); see Oxford House-A v. City of University City, 87 F.3d 1022, 1024 (8th Cir. 1996). Some statutes, such as the FHA, define the term "prevailing party" according to § 1988. See 42 U.S.C. §3602(o) ("'Prevailing party' has the same meaning as such term has in section 1988 of this title"). In other cases, courts have applied the catalyst theory even in the absence of "prevailing party" language in the statute. For example, the catalyst theory has been applied under the Labor-Management Reporting and Disclosure Act ("LMRDA"), which provides that "[t]he court in such action may, in its discretion, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." See Brown v. Local 58, 76 F.3d 762, 773 (6th Cir. 1996) (quoting 29 U.S.C. § 431(c)). But see Stomper, 27 F.3d at 318 (Seventh Circuit finding that LMRDA requires a plaintiff to prevail by formal judgment rather than settlement to be eligible for attorneys' fees).

The catalyst theory has not been applied to the fee-shifting provision of the Racketeer-Influenced and Corrupt Organizations ("RICO") Act, which provides that the victorious plaintiff may recover treble damages and which allows recovery of attorneys' fees only as part of that

damages award. See Aetna Cas. & Sur. Co. v. Liebowitz, 730 F.2d 905, 906 (2d Cir. 1984) (citing 18 U.S.C. § 1964(c)). The civil RICO statute has been interpreted as requiring a plaintiff to obtain a judgment for damages before being eligible for attorneys' fees, since the statute does not contain the "considerably broader and more flexible" language found in "prevailing party" statutes and instead allows a plaintiff to "recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." Id. at 907.

The statutory language of the Clayton Anti-Trust Act is instructive because it contains different fee-shifting provisions for different types of lawsuits, one allowing recovery of attorneys' fees only as part of a treble damages award and two others containing "prevailing party" language which do not require a damages award for recovery of attorneys' fees. See 15 U.S.C. § 15(a) (allowing an injured party to recover "threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee"); 15 U.S.C. § 26 (providing that a party suing for injunctive relief may recover attorneys' fees if he "substantially prevails"); 15 U.S.C. § 4304 (providing that any "substantially prevailing claimant under the antitrust laws" may be awarded attorneys' fees in a lawsuit based on a joint venture). Courts interpreting 15 U.S.C. § 15(a) have held that a party must secure a damage award before it may be eligible for attorneys' fees. See City of Detroit v. Grinnell Corp., 495 F.2d 448, 459 (2d Cir. 1974) ("The provision for recovery of attorneys' fees contained in Section 4 of the Clayton Act [15 U.S.C. § 15(a)] is dependent upon recovery of a judgment."). The Clayton Act was later amended to include "prevailing party" language, a change that resulted in courts adopting the catalyst theory to allow recovery of

attorneys' fees under these sections by plaintiffs who did not win a damages award but who achieved success on other aspects of their claims. See F. & M. Schaeffer Corp. v. C. Schmidt & Sons, Inc., 476 F. Supp. 203, 207 (S.D.N.Y. 1979) (construing 15 U.S.C. § 26).

These examples suggest that when Congress ties attorneys' fees to treble damage awards, it means to exclude a catalyst theory of recovery. But when Congress inserts terminology regarding the party who prevails, it intends that attorneys' fees may be awarded absent adjudication of the merits of the lawsuit. Preemptively, Congress is aware of the way in which courts have interpreted the "prevailing party" language of fee-shifting statutes. See Aetna Cas. & Sur. Co., 730 F.2d at 908 & n.3 (citing the various statutes in which "prevailing party" or similar terms are used as evidence that Congress is knowledgeable regarding how to permit the award of attorneys' fees to a plaintiff who does not litigate his claim through to trial). Hensley plainly states that the catalyst theory applies to all prevailing party fee-shifting statutes. See Hensley, 461 U.S. at 433 n.7. The Third Circuit has firmly endorsed the catalyst theory as well.

This Court concludes that the use of prevailing party language in Magnuson-Moss suggests that attorneys' fees are not tied to damages award and that the catalyst theory is available. Accordingly, a party whose lawsuit causes a defendant to take remedial action that the plaintiff sought in his lawsuit is the party who "prevails" under Magnuson-Moss.

c) "Finally"

The Magistrate Judge found that a plain-meaning reading of Magnuson-Moss' fee-shifting provision precluded application of the catalyst theory because the statute used the term "finally" to modify "prevails," rather than simply saying "prevailing party." Although "finally prevails" may suggest that a consumer must win the litigation in order to merit attorneys' fees, the cases discussed above demonstrate that is not always the case. The parties have not alerted the Court to, nor is the Court aware of, any judicial opinion that directly addresses the meaning of the term "finally" under Magnuson-Moss. In view of the cases discussed above, this Court concludes that the term "finally" does not exclude the catalyst theory.

None of the cases allowing recovery of attorneys' fees after settlement, rescission, or arbitration placed any special emphasis on the word "finally." In fact, all of the courts that considered awarding attorneys' fees under Magnuson-Moss treated it simply as a "prevailing party" statute governed by Hensley. See e.g., McGinty, 1998 WL 544953; Elder, 1997 WL 734036; Hines, 971 F. Supp. at 214 (E.D. Pa. 1997); Allen, 1997 WL 117015 at *1; Rivera, 1996 WL 383306 at *1; Estel v. Chrysler Corp., 1996 WL 208375 (E.D. Pa. 1996); Stitsworth, 1996 WL 67610 at *1. Likewise, the New Jersey courts in Ventura and Jankowitz did not placed any emphasis on the term "finally" when considering whether the consumers could be prevailing parties under the Act.

The court sees nothing talismanic about the word "finally" which would suggest that the fee-shifting provision of Magnuson-Moss has a meaning any more or less restrictive than the term "prevailing party" in similar fee-

shifting provisions of other statutes. Rather, the Court believes the word "finally" means that a party may not recover attorneys' fee until the litigation is over. Congress thus differentiated Magnuson-Moss from fee-shifting statutes that allow interlocutory awards of attorney's fees, such as the Criminal Justice Act. See 18 U.S.C. § 3006A. Thus, attorneys' fees are available under Manguson-Moss only when a case is concluded.

As the Supreme Court noted in Hewitt, the desired end of litigation is not always a court's judgment, but rather cessation or effectuation of some conduct by a party. When a defendant accedes to a plaintiff's demands and a lawsuit is thereby mooted and must be dismissed, that lawsuit can be said to have reached finality even in the absence of a court's resolution of the merits. At the time Magistrate Judge Chesler considered the catalyst issue, plaintiffs' case was still being litigated and had not reached finality. Now, the case has been dismissed at the request of the plaintiffs. Dismissal is a "final" order that satisfies the finality requirement of the Act.

2. Legislative Intent and Public Policy

Allowing a catalyst theory is consistent with the legislative history and public policies underlying Magnuson-Moss. The Act authorizes consumers to commence civil actions for damages or other relief for the breach of any express or implied warranty or service contract by the provider of consumer goods. See Alperin & Chase, Consumer Law, § 258 at 431-32. The Act is remedial in nature and meant to provide "exceedingly broad" enforcement power for consumers. See id. Amount the goals of the Magnuson-Moss Act were "to make warranties

on consumer products more readily understood and enforceable" and to enhance consumer protection. See H.R. Rep. 93-1107.

Congress intended "to make the pursuit of consumer rights involving inexpensive products economically feasible" by allowing consumers to act as private attorneys general and to recover attorneys fees when their efforts vindicate the rights of consumers. See S. Rep. 93-151, 23-24 (1973); see also Derfner & Wolf, Court Awarded Attorney Fees, § 5.03[4] (noting that "[t]he fee shifting measures contained in consumer protection laws . . . are decidedly pro-plaintiff" and discussing Magnuson-Moss as an example of a statute meant to assist consumer enforcement of congressional policies). Commentators have deemed the Act's fee-shifting provisions to be the most important aspect of the Act. See Bixby, "Judicial Interpretation of the Magnuson-Moss Warranty Act," 22 Am. Bus. L.J. 125, 154 (1984). It is perhaps only because of the fee-shifting provision that the Act has become a useful consumer tool to enforce product warranties. See id. at 162 ("It is largely because of the attorneys' fees provision that the Act has been able partially to fulfill its purpose."). Without the opportunity to recover attorneys' fees, the high cost of litigation would outweigh the benefits of consumer enforcement of warranties for less-costly goods. See id. ("The 'lemon-aid' Congress intended to serve consumers by enacting the Magnuson-Moss Warranty Act would be unaffordable without the routine awarding of attorneys' fees to successful plaintiffs.").

Courts have found under other statutes authorizing consumers to act as private attorneys general that awarding attorneys' fees is essential to enforcement and that allowing a defendant to avoid attorneys' fees by taking voluntary action

to moot the controversy would defeat legislative intent. See e.g., Southwest Marine, Inc. v. Campbell Indus., 732 F.2d 744 (9th Cir. 1984) (applying catalyst theory under amended fee-shifting section of Clayton Act). The Third Circuit clearly expressed such concerns in Baumgartner when it stated: "[F]rom a policy standpoint, if defendants could deprive plaintiffs of attorney's fees by unilaterally mooting the underlying case by conceding to plaintiffs' demands, attorneys might be more hesitant about bringing these . . . suits, a result inconsistent with Congress' intent . . . ." Baumgartner, 21 F.3d at 548 (applying catalyst theory under § 1988). This Court believes that ruling out the catalyst theory under Magnuson-Moss could encourage defendants who find that their case is going poorly to take voluntary action to moot the case and thereby deprive plaintiffs of the opportunity to recover attorneys' fees. This could deter consumers from bringing meritorious claims because they could risk being left with a large bill for attorneys' fees. That is inconsistent with the civil enforcement rationale of the Act and the legislative policy goals of compensating injured consumers and encouraging a safer marketplace. Allowing defendants to escape from meritorious claims and leave consumers with legal bills would work against Congress' purpose that the Act should "make the pursuit of consumer rights involving inexpensive products economically feasible." S. Rep. 93-151, 23-24 (1973).

The Third Circuit has applied the catalyst theory under § 1988, IDEA, EHA and EAJA, while other circuits have applied it under the LMRDA and the FHA. All are citizen-protection statutes meant to encourage individuals to act as private attorneys general in the public interest and the catalyst theory serves those interests. For similar reasons, the New Jersey courts found that the legislative and public

policies underlying Magnuson-Moss are served allowing the catalyst theory. See Ventura, 180 N.J. Super. at 66 ("The award of counsel fees fulfills the intent of the Magnuson-Moss Warranty Act. Without such an award consumers frequently would be unable to vindicate warranty rights accorded by law.").

This Court believes that Baumgartner guides its analysis of the viability of the catalyst theory for attorneys' fees under Magnuson-Moss. The Act is intended to enforce consumer warranties and thereby protect consumers and public at large from unsafe consumer products. As stated earlier, a court's construction of a statute should not place "magnified emphasis upon a single ambiguous word in order to give it a meaning contradictory to the fair import of the whole remaining language." United States v. Brown, 333 U.S. 18, 25-26 (1948). In this court's view, it would not serve the legislative intent of Magnuson-Moss or public policy to construe its "finally prevails" language as meaning something more restrictive than the "prevailing party' language in many similar fee-shifting provisions with similar legislative purposes. For the policy reasons set out by the Third Circuit in Baumgartner, the Court finds that the legislative intent and the public policies underlying Magnuson-Moss are best served by recognizing a catalyst theory for recovery of attorneys' fees. Thus, a plaintiff who can demonstrate the lawsuit was a catalyst for the change sought can be deemed a prevailing party eligible for an award of attorneys' fees.

3. Summary

For the reasons discussed above, this Court finds that terms "finally, "prevails," and "as part of the judgment" in

the attorneys-fee provision of Magnuson-Moss do not preclude application of the catalyst theory to determine if a consumer plaintiff is eligible for a recovery of attorneys' fees. Rather, the Court finds that a plaintiff who can demonstrate a change in legal status between himself and the defendant and a causal link between his lawsuit and that change can be said to have "prevailed" under Magnuson-Moss. Such a prevailing plaintiff would be eligible for attorneys' fees when the action is "final," meaning that the lawsuit is concluded, because interlocutory fees are not available. The prevailing plaintiff may recover attorneys' fees "as part of the judgment" entered by the Court upon termination of the case, including a dismissal, regardless of whether the plaintiff has secured an award of damages or litigated to a decision on the merits. Permitting the catalyst theory under the fee-shifting provision of Magnuson-Moss serves the legislative intent of the Act as well as the policies underlying it. Accordingly, this Court will reverse the Magistrate Judge's determination that the language of the Act precluded application of the catalyst theory.

4. Test for Prevailing Party

Determining that the catalyst theory is available does not guarantee that a party claiming victory will be awarded attorneys' fees. See Hewitt, 482 U.S. at 760 (recognizing the vitality of the catalyst theory, yet denying recovery of attorneys' fees to civil rights litigants); Hines, 971 F. Supp. at 214 (noting that an award of attorneys' fees to the prevailing party under Magnuson-Moss is not automatic; rather, the party seeking fees bears the burden of proof); Kathleen H., 154 F.3d at 14 (acknowledging that a plaintiff can demonstrate that she prevailed by showing that she acted as a catalyst for a change in the legal relationship of the

parties, but denying plaintiffs' fee application). A party seeking attorneys' fees still has the burden of proving causation before it is entitled to recovery. See B.K., 998 F. Supp. at 474 (plaintiffs can demonstrate prevailing party status by establishing causation under the catalyst theory); Brown v. Local 58, 76 F.2d at 773 (noting that while the catalyst theory applied under LMRDA, plaintiffs' action was not in fact causally related to the union's subsequent amendment of its bylaws).

The Third Circuit laid out the two-part test for a prevailing party to recover under the catalyst theory in Baumgartner. A court considering an attorney-fee request should ask: "[1] whether plaintiffs achieved relief and [2] whether there is a causal connection between the litigation and the relief from the defendant." Baumgartner, 21 F.3d at 546 (citing Wheeler, 950 F.2d at 131). The first prong may be satisfied by a plaintiff who achieves "some of the benefit sought in a lawsuit, even through the plaintiff does not ultimately succeed in securing a favorable judgment." Id. The second prong of the test, causation, may be established

> either by obtaining a judgment, consent decree or a settlement that 'change[s] the legal relations of the parties such that defendants [are] legally compelled to grant relief' or through a 'catalyst' theory, where even though the litigation did not result in a favorable judgment, the pressure of the lawsuit was a material contributing factor in bringing about extrajudicial relief.

Id. (citing Wheeler, 950 F.2d at 131). Plaintiffs must show that they received "some of the benefit sought" and that "the pressure of the lawsuit was a material contributing factor in

bringing about extrajudicial relief." Baumgartner, 21 F.3d at 546; see also Metropolitan Pittsburgh Crusade for Voters v. City of Pittsburgh, 964 F.3d 244, 250 (3rd Cir. 1992) (finding that the inquiry under the catalyst theory is "whether plaintiff achieved some of the benefit sought by the party bringing suit" and that the lawsuit was a "material contributing factor" to the attainment of the relief).

Defendant argues that applying the catalyst theory under Magnuson-Moss will cause increased litigation because plaintiffs' attorneys will piggyback on consumer products investigations by governmental agencies and file lawsuits hoping to recover attorneys' fees if regulatory action results. This is a false fear. Applying the Baumgartner test will defeat "piggyback" claims because the causation prong requires plaintiffs to demonstrate that their lawsuit was, in large part, responsible for the action taken. The test requires plaintiffs to prove that they actually caused the result, not just that they were along for the ride.

5. Discovery on Catalyst Issue

Plaintiffs have argued that extended time for discovery is needed so that they can prove that their lawsuit was a catalyst for the recall of the Bendix 9 and 10 braking systems and that plaintiffs thus qualify as the prevailing party. Plaintiffs claim that despite a 19-month investigation of the Bendix 10 braking system by the NHTSA, defendant showed no interest in recalling the system until plaintiffs filed their lawsuit. Additionally, plaintiffs state that their lawsuit called for a recall of the Benedix 9 braking system a year before the NHTSA began its inquiry into that system. Plaintiffs argue that each of these occurrences suggests that their lawsuit was a motivating factor in the recalls and that

discovery of internal Chrysler memoranda will enable them to prove these claims.

Defendant argues that additional discovery is not needed because plaintiffs cannot be said to have prevailed in their lawsuit. Specifically, defendant notes that plaintiffs failed to gain class certification, that they originally sought money damages and received none, that they continued to litigate the case for two years after the recall of the braking systems, and that the recalls were prompted by the NHTSA investigation, not plaintiffs' lawsuit.

The facts that plaintiffs continued to litigate their case after the recall was announced and sought but not receive money damages are immaterial to the question of whether plaintiffs' lawsuit was a catalyst for the recall. Plaintiffs need not have obtained all of the relief they sought in order to qualify as the prevailing party, nor need they have abandoned the lawsuit when they received part of the relief they were seeking. Plaintiffs also need not prove that their lawsuit was the sole cause of Chrysler's action.

The timing of Chrysler's recall, following filing of this lawsuit, raises a question of whether the lawsuit was a material contributing factor in Chrysler's decision to recall the Bendix 9 and 10 braking systems. Also at issue are whether the NHTSA investigations were the superseding motivating factors. Deciding these issues will require the Court to analyze the chronology of events and the circumstances under which defendant decided to recall the braking systems. Further discovery into the factors that contributed to Chrysler's recall could help the Court decide the ultimate issue of whether plaintiffs' lawsuit was a catalyst for the recall. Accordingly, the Court will grant the

plaintiffs' motion for further discovery into the motivations and decision-making process for Chrysler's remedial actions.

The question of whether plaintiffs should be awarded attorneys' fees will be remanded to Magistrate Judge Chesler for consideration in accordance with this opinion.

6. Defendant's Motion to Strike Ditlow Declaration

Defendant has moved to have this Court strike the declaration of Clarence Ditlow in support of plaintiffs' motion for attorneys' fees. Defendant argues that the Ditlow declaration contains primarily legal arguments and opinions rather than statements of fact within the personal knowledge of the affiant as required by Local Rule 7.2(a). This Court's consideration of plaintiffs' appeal of Magistrate Judge Chesler's Order involved statutory interpretation, which is wholly a question of law. The Court did not rely on affidavits submitted because the fact question of plaintiffs' right to attorneys' fees was not before the Court. Therefore, defendant's motion to strike the Ditlow declaration is moot at this point and will be denied.

Accordingly, **IT IS** on this [14th] day of December 1999 **ORDERED** that Magistrate Judge Chesler's August 24, 1999 Order is reversed and the matter is remanded for further consideration consistent with this opinion.

IT IS FURTHER ORDERED that plaintiffs' motion for further discovery pertaining to the catalyst issue is granted.

IT IS FURTHER ORDERED that defendant's motion to strike the declaration of Clarence Ditlow is denied as moot.

[signed]
John C. Lifland
United States District Judge

Supreme Court, U.S.
FILED
DEC 20 2000
CLERK

Dec 20, 2000

No. 99-1848

IN THE

Supreme Court of the United States

BUCKHANNON BOARD AND CARE HOME, INC., *et al.*,
Petitioners,

v.

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, *et al.*,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF THE STATES OF MARYLAND, ALABAMA, CALIFORNIA, COLORADO, DELAWARE, FLORIDA, ILLINOIS, KANSAS, LOUISIANA, MASSACHUSETTS, MISSOURI, MONTANA, NEBRASKA, NEW HAMPSHIRE, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, AND VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

MAUREEN M. DOVE
ANDREW H. BAIDA*
Assistant Attorneys General
200 St. Paul Place, 20th Floor
Baltimore, Maryland 21202
(410) 576-6318

Counsel for *Amici* States

**Counsel of Record*

[additional counsel listed on inside cover]

BEST AVAILABLE COPY

BILL PRYOR
Attorney General of
Alabama
11 South Union Street
Montgomery, AL 36130

BILL LOCKYER
Attorney General of
California
1300 I Street
Sacramento, CA 94244

KEN SALAZAR
Attorney General of
Colorado
1525 Sherman Street
Denver, CO 80203

M. JANE BRADY
Attorney General of
Delaware
820 N. French Street
Wilmington, DE 19801

ROBERT A. BUTTERWORTH
Attorney General of Florida
The Capitol PL-01
Tallahassee, FL 32399-1050

JAMES E. RYAN
Attorney General of Illinois
100 West Randolph Street
Chicago, IL 60601

CARLA J. STOVALL
Attorney General of Kansas
301 S.W. 10th Avenue
Topeka, KS 66612-1597

RICHARD P. IEYOUB
Attorney General of
Louisiana
301 Main Street, Suite 600
Baton Rouge, LA 70804-
9005

THOMAS F. REILLY
Attorney General of
Massachusetts
One Ashburton Place
Boston, MA 02108-1698

JEREMIAH W. (JAY) NIXON
Attorney General of
Missouri
Supreme Court Building
207 West High Street
Jefferson, MO 65101

JOSEPH P. MAZUREK
Attorney General of
Montana
P.O. Box 201401
215 N. Sanders
Helena, MT 59620-1401

DON STENBERG
Attorney General of
Nebraska
Department of Justice
2115 State Capitol
Lincoln, NE 68509

PHILIP T. MCLAUGHLIN
Attorney General of New
Hampshire
33 Capitol Street
Concord, NH 03301

MICHAEL F. EASLEY
Attorney General of
North Carolina
Department of Justice
P.O Box 629
Raleigh, NC 27602-0629

HEIDI HEITKAMP
Attorney General
of North Dakota
600 E. Boulevard
Bismark, ND 58505-0040

BEST AVAILABLE COPY

BETTY D. MONTGOMERY
Attorney General of Ohio
30 E. Broad St., 17th Fl.
Columbus, Ohio 43215

W.A. DREW EDMONSON
Attorney General of
Oklahoma
4545 N. Lincoln Blvd.
Suite 260
Oklahoma City, OK 73105-
3498

HARDY MYERS
Attorney General of Oregon
1162 Court St. N.E.
Salem, OR 97310

D. MICHAEL FISHER
Attorney General of
Pennsylvania
16th Fl., Strawberry Square
Harrisburg, PA 17120

SHELDON WHITEHOUSE
Attorney General of
Rhode Island
150 South Main Street
Providence, RI 02903

CHARLES M. CONDON
Attorney General
of South Carolina
Rembert C. Dennis
Office Building
P.O. Box 11549
Columbia, SC 29211-1549

MARK BARNETT
Attorney General
of South Dakota
500 East Capitol Avenue
Pierre, SD 57501-5070

PAUL G. SUMMERS
Attorney General of
Tennessee
425 Fifth Avenue North
Nashville, TN 37243-0405

JOHN CORNYN
Attorney General of Texas
P.O. Box 12548
Austin, TX 78711-2548

JAN GRAHAM
Attorney General of Utah
236 State Capitol
Salt Lake City, UT 84114

MARK L. EARLEY
Attorney General of
Virginia
900 East Main Street
Richmond, VA 23219

QUESTION PRESENTED

After a final order of dismissal that disposes of all claims in a case, may plaintiffs who have not obtained a judgment, consent decree, or settlement agreement be prevailing parties for purposes of obtaining attorneys' fees under federal fee-shifting statutes?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

A PARTY WHO DOES NOT OBTAIN EITHER A JUDGMENT, CONSENT DECREE, OR SETTLEMENT AGREEMENT IS NOT A PREVAILING PARTY FOR PURPOSES OF OBTAINING ATTORNEYS' FEES UNDER FEDERAL FEE-SHIFTING STATUTES 3

A. The Rule Applied By The Court Of Appeals To Determine Prevailing Party Status Fully Complies With This Court's Attorneys' Fees Decisions 3

B. The Court Of Appeals' Decision Is Not Contrary To The Legislative History Or Policies Of Fee-Shifting Statutes 10

CONCLUSION 16

TABLE OF AUTHORITIES

CASES:

American Council of the Blind of Colorado, Inc. v. Romer, 992 F.2d 249 (10th Cir.1993), *cert. denied*, 510 U.S. 864 (1993) 9

Aspira of New York, Inc. v. Board of Education of the City of New York, 65 F.R.D. 541 (S.D.N.Y. 1975) 10,12

Association for Retarded Citizens of Connecticut v. Thorne, 68 F.3d 547 (2nd Cir.1995) 7

Beard v. Teska, 31 F.3d 942 (10th Cir.1994) 9

Blau v. Rayette-Faberge, Inc., 389 F.2d 469 (2nd Cir.1968) 10,11

Board of Education of Downers Grove Grade School v. Steven L., 89 F.3d 464 (7th Cir.1996) 8

Boeing Co. v. Van Gemert, 444 U.S. 472 (1980) 11

Bogan v. Scott-Harris, 523 U.S. 44 (1998) 14

Brown v. Local 58, Int'l Brotherhood of Electrical Workers, 76 F.3d 762 (6th Cir. 1996) 9

Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978) 12

Craig v. Gregg County, 988 F.2d 18 (5th Cir.1993) ... 8

Farrar v. Hobby, 506 U. S. 103 (1992) 3,4,5,6,7

Foreman v. Dallas County, Texas,193 F.3d 314 (5th Cir.1999), *cert. denied*, 120 S.Ct. 1673 (2000) 8,14

Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.,120 S.Ct. 693 (2000) 6

Gilson v. Chock Full O'Nuts Corp., 331 F.2d 107 (2nd Cir.1964) 10,11

Hanrahan v. Hampton, 446 U.S. 754 (1980) 4

Hensley v. Eckerhart, 461 U.S. 424 (1983) 4,14

Hewitt v. Helms, 482 U.S. 755 (1987) 4,5,6,12

Kentucky v. Graham, 473 U.S. 159 (1985) 4,13

Kilgour v. City of Pasadena, 53 F.3d 1007 (9th Cir.1995) 9

Kopet v. Esquire Realty Co., 523 F.2d 1005 (2nd Cir.1975) 10,11

Little Rock School District v. Pulaski County Special School District, 17 F.3d 260 (8th Cir.1994) 7

Maher v. Gagne, 448 U.S. 122 (1980) 5,9,10

Marbley v. Bane, 57 F.3d 224 (2nd Cir.1995) 7

Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir.1978) 7

Parham v. Southwestern Bell Telephone Co., 433 F.2d 421 (8th Cir.1970) 10,11,12
Payne v. Board of Education, 88 F.3d 392 (6th Cir.1996) 9
S-1 and S-2 by and through P-1 and P-2 v. State Board of Education of North Carolina, 6 F.3d 160 (4th Cir.1993) 3,6,7,13
S-1 and S-2 by and through P-1 and P-2 v. State Board of Education of North Carolina, 21 F.3d 49 (4th Cir.), *cert. denied*, 513 U.S. 876 (1994) 3
Rhodes v. Stewart, 488 U.S. 1 (1988) 4,5
Richards v. Griffith Rubber Mills, 300 F.Supp. 338 (D. Ore.1969) 10,11,12
Tenny v. Brandhove, 341 U.S. 367 (1951) 14
Texas State Teachers Ass'n v. Garland Independent School District, 489 U.S. 782 (1989) 3,4,5
Thomas v. Honeybrook Mines, Inc., 428 F.2d 981 (3rd Cir.1970), *cert. denied*, 401 U.S. 911 (1971) 10,11
Zinn v. Shalala, 35 F.3d 273 (7th Cir.1994) 8

STATUTES AND RULES :
15 U.S.C. § 78p(b) 11
42 U.S.C. § 1988 4,6
Sup. Ct. R. 37 1

MISCELLANEOUS:
S.Rep. No. 1011, 94th Cong., 2nd Sess. (1976) ... 10,12
H.R. Rep. No. 1558, 2nd Sess. (1976) 10

Pursuant to Sup. Ct. R. 37, the signatory States respectfully submit this brief as *amici curiae* in support of respondent.

INTEREST OF *AMICI CURIAE*

As institutional defendants in actions brought under a broad range of federal fee-shifting laws, the States have a significant interest in the question whether the catalyst theory is available to establish a plaintiff's status as a prevailing party. The resolution of that question will affect the States in two ways. First, a decision that adopts the standard advanced by petitioners and their *amici* will affect the States financially because it will establish an additional avenue by which plaintiffs may obtain attorneys' fees from public treasuries. Second, and more fundamentally, this case will affect the manner in which government officials exercise core legislative and executive functions if this Court holds that petitioners can establish prevailing party status by showing that their suit was the catalyst for the statutory change that rendered their action moot. Allowing fees in such circumstances will inevitably influence the manner in which public officials amend law and policy, and will in many circumstances demand that the legislative branch of government explain to the judicial branch the motivations behind the legislature's exercise of its law-making authority. The outcome of this case, therefore, will have a direct impact on State government.

SUMMARY OF ARGUMENT

The decision of the court of appeals should be affirmed because the court committed no error in holding that a plaintiff is not a prevailing party for the purpose of an award of attorneys' fees in the absence of a judgment, consent decree, or judicially enforceable settlement agreement. This Court has consistently held that an award of fees is improper unless the plaintiff obtains a change in his or her legal relationship with the defendant. In stating that prevailing party status is contingent on the existence of

a judgment, consent decree, or settlement agreement, the court of appeals in this case has merely identified the bright-line criteria it uses for determining whether a material change in the legal relationship has occurred that would give rise to a fee award. Those criteria are proper because they ensure that a party can prevail only if that party secures relief through the courts.

A change in policy, law, or regulation achieved through any other forum is not the type of change upon which a party can rely to establish prevailing party status in litigation, as a party should not be awarded fees from the judicial system for change effectuated through actions undertaken before and by the legislative or executive branches of government. On a technical level, the party against whom fees are sought is frequently not even the party who caused the change through the non-judicial process, and it is just as frequently difficult, if not impossible, to ascertain the motivations of the legislature or the executive branch, each of which is subject to multiple legitimate influences, concerns, and interests. From a substantive standpoint, such motivations should not provide the basis for a fee award, as government officials should be able to freely exercise their legislative and executive functions to advance the public interest, unencumbered by the fear of exposing themselves and their government processes to the disruptive and highly intrusive burden of attorney fee litigation. Attorneys' fee-shifting statutes were simply not intended to fund public policy changes that are accomplished through traditional political operations. The decision below should accordingly be affirmed.

ARGUMENT

A PARTY WHO DOES NOT OBTAIN EITHER A JUDGMENT, CONSENT DECREE, OR SETTLEMENT AGREEMENT IS NOT A PREVAILING PARTY FOR PURPOSES OF OBTAINING ATTORNEYS' FEES UNDER FEDERAL FEE-SHIFTING STATUTES

A. The Rule Applied By The Court Of Appeals To Determine Prevailing Party Status Fully Complies With This Court's Attorneys' Fees Decisions.

The standard that the court of appeals used in this case in determining petitioners' fee eligibility should be affirmed because the application of that standard demonstrates that petitioners have failed to identify any significant change in their legal relationship in their litigation with West Virginia giving rise to a fee award. "The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute." *Texas State Teachers Ass'n v. Garland Independent School District*, 489 U.S. 782, 792-93 (1989). As this Court recognized in *Farrar v. Hobby*, 506 U. S. 103 (1992), "[n]o material alteration of the legal relationship between the parties occurs until the plaintiff becomes entitled to enforce a judgment, consent decree, or settlement against the defendant." *Id.* at 113. Citing this language, the court of appeals in its *en banc* decision in *S-1 and S-2 by and through P-1 and P-2 v. State Board of Education of North Carolina*, 21 F.3d 49, 51 (4th Cir.) (adopting Judge Wilkinson's dissenting opinion in 6 F.3d 160, 168 (4th Cir.1993), *cert. denied*, 513 U.S. 876 (1994)), identified three ways in which it is possible to change the legal relationship of parties in litigation: by judgment, consent decree, or settlement agreement enforceable by a court. The

synthesis of this Court's decisions discussed in *Farrar* and *S-1* on the issue of prevailing party status demonstrates how this precedent not only supports, but foreordains and requires the conclusion that the court of appeals reached in this case.

In its review in *Farrar* of its prior attorneys' fees decisions, this Court quoted *Hanrahan v. Hampton*, 446 U.S. 754, 758 (1980), for the proposition that "Congress intended to permit the . . . award of counsel fees only when a party has prevailed on the merits." 506 U.S. at 109. To qualify for attorneys' fees, therefore, the party must have prevailed on a merits issue, not a mere procedural point. Observing that in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), the Court accepted a "generous formulation" of the term "prevailing party," and held that one could prevail for purposes of attorneys' fees by succeeding on any significant issue in litigation that achieved some of the benefits sought, the Court in *Farrar* also noted the confirmatory language in *Kentucky v. Graham*, 473 U.S. 159 (1985), that "liability on the merits and responsibility for fees go hand in hand; where a defendant has not been prevailed against, either because of legal immunity or on the merits, §1988 does not authorize a fee award against that defendant." *Farrar*, 506 U.S. at 109 (quoting *Graham*, 473 U.S. at 165).

After discussing these cases, the Court in *Farrar* reviewed what were, at the time, its three most recent prevailing party decisions: *Hewitt v. Helms*, 482 U.S. 755 (1987); *Rhodes v. Stewart*, 488 U.S. 1 (1988) (per curiam); and *Texas State Teachers Ass'n v. Garland Independent School Dist.*, 489 U.S. 782 (1989). *Hewitt* clarified that "[r]espect for ordinary language requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail," and that to obtain fees, the plaintiff must "prove 'the settling of some dispute which affects the behavior of the defendant towards the plaintiff.'"

Farrar, 506 U.S. at 110 (quoting *Hewitt*, 482 U.S. at 760, 761). *Rhodes* further elaborated on the definition of "relief" by holding that a declaratory judgment finding a violation of federal law is not enough and that "a judgment – declaratory or otherwise – 'will constitute relief . . . if, and only if, it affects the behavior of the defendant toward the plaintiff." *Farrar*, 506 U.S. at 110 (quoting *Rhodes*, 488 U.S. at 4). Finally, *Texas Teachers* "synthesized the teachings of *Hewitt and Rhodes,*" *Farrar*, 506 U.S. at 111, by holding that "the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant." *Id.* (quoting *Texas Teachers*, 489 U.S. at 792).

Concluding its review of its attorneys' fee jurisprudence on prevailing party status, this Court stated:

> Therefore, to qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim. The plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought, *Hewitt, supra*, 482 U.S., at 760, 107 S.Ct., at 2675, or comparable relief through a consent decree or settlement, *Maher v. Gagne*, 448 U.S. 122, 129, 100 S.Ct. 2570, 2574, 65 L.Ed.2d 653 (1980). Whatever relief the plaintiff secures must directly benefit him at the time of the judgment or settlement. *See Hewitt, supra*, 482 U.S., 764, 107 S.Ct., at 2677. Otherwise the judgment or settlement cannot be said to 'affec[t] the behavior of the defendant towards the plaintiff.' *Rhodes, supra*, 488 U.S., at 4, 109 S.Ct., at 203. Only under these circumstances can civil rights litigation effect 'the material alteration of the legal relationship of the parties' and thereby transform the plaintiff into a prevailing party. *Garland, supra*, 489 U.S., at 792-

> 793, 109 S.Ct., at 1494. In short, a plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.

Farrar, 506 U.S. at 111.

Even though, as this Court recently pointed out, *Farrar* "involved no catalytic effect," *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 120 S.Ct. 693, 711 (2000), the court of appeals' reliance in *S-1* on this language in *Farrar* does no more than state the three ways in which it is possible to change the legal relationship in litigation: by judgment, consent decree, or judicially enforceable settlement agreement. Contrary to some analyses, this is not a startling new concept, nor does it disregard any of this Court's precedents. Indeed, this Court had never defined the outer boundaries of the term "prevailing party." Rather, in the only case in which it was faced with the question of whether a party who claimed his litigation was the catalyst to change and was therefore a prevailing party, this Court specifically withheld opinion on the issue, stating that "[w]e need not decide the circumstances, if any, under which this 'catalyst' theory could justify a fee award under § 1988...." *Hewitt*, 482 U.S. at 762.

In reserving judgment in *Hewitt* on the possibility of such a fourth avenue for obtaining fees, this Court observed that a fee award could be justified if the lawsuit produced a voluntary change in conduct by a defendant. 482 U.S. at 760-61. As Judge Wilkinson explained in *S-1*, however, the "voluntary change in conduct" language in *Hewitt* does not necessarily "extend the ways to attain prevailing party status beyond the three situations later listed in *Farrar*." 6 F.3d at

171. Rather, "*Farrar*'s inclusion of settlements between parties encompasses both monetary settlements and agreements to a change in conduct." *Id.* While a plaintiff who secures either will have prevailed without a formal judgment, "a voluntary change in conduct must be formalized in a legally enforceable settlement agreement to transform a plaintiff into a prevailing party...." *Id.*

While petitioners and their *amici* point out that other federal courts of appeals have disagreed with this application of *Farrar*, some of these decisions contain no analysis whatsoever, and merely recite that the catalyst theory remains viable. *See, e.g., Little Rock School District v. Pulaski County Special School District*, 17 F.3d 260, 263 n.2 (8th Cir.1994). Some cases rely on *Nadeau v. Helgemoe*, 581 F.2d 275 (1st Cir.1978), as the "seminal" catalyst theory case, but ignore that *Nadeau* actually used the catalyst theory to determine whether a party who had a court-enforceable consent decree was the prevailing party because he had been the catalyst to the settlement. *Id.* at 279.

Moreover, a close reading of many of the other cases cited reveals that the court of appeals' analysis and application of prevailing party law in this case is not substantially different from that of many other circuits but rather represents more a difference of semantics than substance. Although the Second Circuit explicitly retained the catalyst test in *Marbley v. Bane*, 57 F.3d 224, 234 (2nd Cir.1995), the same court several months later in *Association for Retarded Citizens of Connecticut v. Thorne*, 68 F.3d 547 (2nd Cir.1995), ignored *Marbley* and observed that "[r]ecent Supreme Court cases have stated that the key to determining whether a party prevails is whether the litigation resulted in an alteration of the legal relationship between the parties. The 'plaintiff must obtain an enforceable judgment against the defendant from whom

fees are sought . . . or comparable relief through a consent decree or settlement.'" 68 F.3d at 552 (quoting *Farrar*, 506 U.S. at 111) (ellipsis in original) (other citations omitted). The court concluded that no such change in legal relationship had occurred, but held that, in any case, the lower court no longer had subject matter jurisdiction. *Assn. for Retarded Citizens*, 68 F.3d at 552.

Likewise, although the Seventh Circuit in *Zinn v. Shalala*, 35 F.3d 273 (7th Cir.1994), explicitly retained the catalyst theory, the same circuit in *Board of Education of Downers Grove Grade School v. Steven L.*, 89 F.3d 464 (7th Cir.1996), held that the plaintiff could not be considered to have substantially prevailed because the outcome of the suit had resulted in no enforceable obligation on the part of the school district, and no relief was in the form of a judgment or enforceable settlement. *Id.* at 468.

Similarly, the Fifth Circuit stated in *Foreman v. Dallas County, Texas*, 193 F.3d 314 (5th Cir.1999), *cert. denied*, 120 S.Ct. 1673 (2000), that it had never fully explored the impact of *Farrar* on the viability of the catalyst theory and that it had never addressed the issue directly. 193 F.3d at 320. The court observed that *Farrar* places "the continuing validity of the catalyst theory in serious doubt," *id.*, as its language "strongly suggests that the plaintiff must obtain some merits-based relief which alters its legal standing with the defendant before it may claim prevailing party status." *Id.* However, the court declined to "engage in that close debate," *id.*, holding that, if the catalyst theory still applies, the facts did not support a finding that the plaintiff had either obtained the relief he sought by the legislative change that ended the case, or proved that he was the cause of that change. *Id.* at 320-21. The court in *Craig v. Gregg County*, 988 F.2d 18 (5th Cir.1993), also questioned whether the catalyst theory was still good law, but reached no resolution because the plaintiff had not shown causation in any event.

The Fifth Circuit has thus never spoken definitively on the issue.

In some of the cases cited by petitioners, there existed a judgment, consent decree, or settlement agreement that supported the attorneys' fee request. *See Kilgour v. City of Pasadena*, 53 F.3d 1007, 1011 (9th Cir.1995) ("Kilgour obtained an enforceable stipulated judgment requiring the City to make substantial modifications to the Rose Bowl press box."); *Beard v. Teska*, 31 F.3d 942, 944 (10th Cir.1994) ("In June 1990 the plaintiff class, Departments and Sand Springs entered into a Settlement Agreement under which the Education Department assumed the responsibility. . . ."). [1] As this Court has explicitly recognized, such relief establishes prevailing party status. *See Farrar*, 506 U.S. at 111; *Maher v. Gagne*, 448 U.S. 122, 128 (1980). The prevailing party standard that the court of appeals applied in this case is entirely consistent with cases such as these, in which the courts merely applied the catalyst theory to determine whether the plaintiff's efforts were causally related to the relief obtained in the litigation.

Thus, the rule of law applied by the Fourth Circuit to determine prevailing party status is not substantively different from that applied by this Court and a number of lower court decisions cited by petitioners and their *amici*.

---

[1] Attorneys' fees were also denied in several of the cases that petitioners claim continue to recognize the catalyst theory. *See Payne v. Board of Education*, 88 F.3d 392, 399-400 (6th Cir.1996); *Brown v. Local 58, Int'l Brotherhood of Electrical Workers*, 76 F.3d 762, 771-73 (6th Cir. 1996); *American Council of the Blind of Colorado, Inc. v. Romer*, 992 F.2d 249, 251 (10th Cir.), *cert. denied*, 510 U.S. 864 (1993).

B. The Court Of Appeals' Decision Is Not Contrary To The Legislative History Or Policies Of Fee-Shifting Statutes.

Nor does the standard applied by the court of appeals contravene either the legislative history underlying attorneys' fee legislation or the policies upon which that legislation is based. Evidence regarding congressional intent to define "prevailing party" is not extensive. Petitioners and their *amici* place heavy reliance on one sentence in a congressional report, which cites to earlier cases: "Moreover for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief. *Kopet v. Esquire Realty Co.*, 523 F.2d 1005 (2nd Cir.1975), and cases cited therein [*Blau v. Rayette-Faberge, Inc.*, 389 F.2d 469 (2nd Cir.1968); *Gilson v. Chock Full O'Nuts Corp.*, 331 F.2d 107 (2nd Cir.1964); *Thomas v. Honeybrook Mines, Inc.*, 428 F.2d 981 (3rd Cir.1970), *cert. den.*, 401 U.S. 911 (1971)]; *Parham v. Southwestern Bell Telephone Co.*, 433 F.2d 421 (8th Cir.1970); *Richards v. Griffith Rubber Mills*, 300 F.Supp. 338 (D. Ore.1969); *Thomas v. Honeybrook Mines, Inc.* [*supra*]; *Aspira of New York, Inc. v. Board of Education of the City of New York*, 65 F.R.D. 541 (S.D.N.Y. 1975)." S.Rep. No. 1011, 94th Cong., 2nd Sess. at 5 (1976). *See also* H.R. Rep. No. 1558, 2nd Sess. at 7 (1976).[2] The phrase "without formally obtaining relief" is not further explicated, except by citation to the cases. None of these

---

[2] *Maher v. Gagne* cites to this language for the proposition that a party may prevail through a settlement as well as through litigation, but the settlement in *Maher* resulted in the entry of a court-enforceable consent decree. *See* 448 U.S. at 129.

cases extends the concept of "informal relief" to include a voluntary change in behavior on the part of the defendant that does not alter the legal relationship between the parties, is not legally enforceable, and is unaccompanied by any judicial finding or admission that federal law has been violated.

Kopet and the cases cited there, including *Honeybrook Mines*, do not involve attorneys' fees collected from a wrongdoer at all. Rather, they involve variations of the "common fund" doctrine, in which a litigant or lawyer who recovers a common fund for the benefit of others is entitled to a reasonable attorneys' fee from the fund as a whole. *See, e.g., Boeing Co. v. Van Gemert*, 444 U.S. 472, 477 (1980) (citing cases). *Kopet, Blau*, and *Gilson* dealt with the rule under the Securities Exchange Act of 1934, 15 U.S.C. § 78p(b), that allows a stockholder to obtain compensation for counsel fees from a corporation that has succeeded in obtaining recovery of profits by insiders in litigation brought by the stockholder or by the corporation at the stockholder's behest. *Kopet* extended this rule to situations in which the corporation has obtained substantial non-monetary benefits from the litigation. *Honeybrook* concerned a variant of the common fund doctrine and involved the actions of an intervenor that forced the trustee-plaintiffs to bring suits that were successful in obtaining recovery. The court held that the intervenor's counsel fees should be paid by the trustee-plaintiffs from the resulting fund.

While *Parham* and *Richards* involved suits brought against alleged violators of federal law, the courts in both cases held that the employer-defendants had violated anti-discrimination laws. On that basis, the courts held that the plaintiffs were entitled to attorneys' fees, even though they had obtained neither damages nor injunctive relief. *See Parham*, 433 F.2d at 428-30; *Richards*, 300 F.Supp. at 340-

41. The court in *Parham* also instructed the district court to retain jurisdiction to assure continuation of an anti-discrimination policy. 433 F.2d at 429. Although the employers had changed their policies after the suits were filed, that factor was considered by the courts only as a reason to withhold injunctive relief. Neither of these decisions supports the award of fees in a case such as this, and it is questionable whether they could withstand this Court's subsequent attorneys' fees decisions in *Hewitt* and *Rhodes* because neither plaintiff received any relief on the merits that affected the behavior of the defendant toward the plaintiff.

The last case cited, *Aspira,* merely confirmed that plaintiffs who had obtained a long, detailed consent decree providing concrete remedies for violations of constitutional and statutory provisions were prevailing parties. In sum, none of the cases cited by Congress supports the broad prevailing party standard petitioners and their *amici* seek.

More general language in the same congressional reports lend support to the proposition that in civil rights cases, as opposed to common fund cases, "when a district court awards counsel fees to a plaintiff, it is awarding them against a violator of federal law." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 418 (1978). Fees are necessary, for example, to ensure that "those who violate the Nation's fundamental laws are not to proceed with impunity," S.Rep. No. 1011, 94th Cong., 2nd Sess. at 2, and thus are "an integral part of the remedy necessary to achieve compliance with our statutory policies" that have enabled "vigorous enforcement of modern civil rights legislation." *Id.* at 3, 4. Fees also ensure that "private attorneys general" will not be deterred from bringing actions "to vindicate the fundamental rights here involved," *id.* at 5; are incident to "securing compliance with these laws," *id.*; and are "part of the remedies necessary to obtain such compliance." *Id.*

Nothing in this legislative history suggests that Congress intended attorneys' fees to attach when no change in the parties' legal relationship occurred in the litigation and no finding or admission of any civil rights violation has ever been made. The core purpose of the "private attorney general" theory endorsed by Congress is the enforcement of important civil rights laws. The rule applied by the court of appeals in this case directly advances that purpose at the same time it discourages plaintiffs in actions such as this, in which no violation of federal law has been found to exist, from collecting fees for pursuing their "private vision of the public good." *S-1*, 6 F.3d at 172 (Wilkinson, J., dissenting).

Conversely, as Judge Wilkinson observed in *S-1*, the catalyst theory discourages public officials from "taking initiatives to revise outmoded ordinances or to improve institutional conditions" because "the catalyst theory empowers courts to award fees for *any* change in behavior that occurs after the filing of a lawsuit, whether or not the court could have ordered that change in conduct." 6 F.3d at 172 (emphasis in original). Such an award not only directly contravenes this Court's express recognition that fee responsibility and liability on the merits "go hand in hand," *Kentucky v. Graham*, 473 U.S. at 165, but it also "serves to disable public officials, who may come to fear that worthwhile changes may be retroactively linked to a lawsuit and result in a hefty bill for attorneys' fees." *S-1,* 6 F.3d at 172. Government officials should not be either deterred from or penalized for carrying out their responsibilities by the threat of attorneys' fee liability and the considerable litigation that typically is necessary to establish that liability.

The adverse impact that such litigation would have on the operation of government cannot be overstated. If parties such as petitioners can be considered prevailing parties, notwithstanding the absence of a judgment, consent decree,

or enforceable settlement agreement, discovery can be expected to include depositions of West Virginia legislators seeking their reasons for repealing the self-preservation requirement previously at issue in this case. Such discovery is not likely to lead to any admissible evidence. Indeed, "the legislative process is fraught with compromises, competing concerns, and unspoken motives," *Foreman v. Dallas County*, 193 F.3d at 321, and so it is speculative at best that the motivations of a legislative body in passing a law can be either parsed so cleanly or even gleaned from the testimony of any individual legislator.

More fundamentally, however, "[a] request for attorney's fees should not result in a second major litigation," *Hensley v. Eckerhart*, 461 U.S. at 437, which would be exactly the result of forcing the legislative branch of State government to provide a federal court with a specific explanation of the reasons underlying the exercise of its law-making authority. It is difficult to envision a greater intrusion by a federal court on such a fundamental power of a State legislature. This encroachment serves no public purpose, aids no goal of enforcing civil rights laws, and runs afoul of the settled principle that "it simply is 'not consonant with our scheme of government for a court to inquire into the motives of legislators.'" *Bogan v. Scott-Harris*, 523 U.S. 44, 55 (1998) (quoting *Tenny v. Brandhove*, 341 U.S. 367, 377 (1951)).

All citizens of this country, of course, are entitled to seek vindication of their rights from any branch of our democratic system of government, but an individual does not become a prevailing party in litigation entitled to attorneys' fees when, as a result of the political rather than judicial process, that relief is secured through the legislative or executive branches from government officials and entities that often are not even parties to the litigation. This does not contravene any fee-shifting policy but simply

reflects the choices that are often available to aggrieved individuals, as issues that are deemed legal in a judicial proceeding are also frequently treated as political. While courts represent one mechanism for addressing those issues, other branches of government in many instances are, as this case illustrates, the fora best equipped for establishing solutions for the difficult and complicated public policy questions that arise when institutional change is sought.

As set forth in petitioners' brief, this case "pitted the concept of 'aging in place' in a residential care home setting against fire safety concerns of the State." Br. at 4. The origins of that dispute were part of a debate that "was not unique to West Virginia" but rather "started on a national level when the National Fire Protection Association (NFPA) developed its 1985 Life Safety Code, to address the fire safety needs of residential care homes." *Id.* As a result of this debate, which apparently was fueled by a national survey showing that "a majority of states had abandoned the concept of self-preservation for residential care homes," *id.* at 5-6, the West Virginia legislature enacted two bills "related to amendments to the State Fire Code" and "the self-preservation provisions in W.Va. §§ 16-5H-1." Br. at 8 n.4. The enactment of these bills resulted in the elimination of the self-preservation requirement that petitioners contested and resolved the issues they raised in this case.

Petitioners are certainly allowed to ask elected officials to provide them with this type of relief, but they are not entitled to attorneys' fees when they are successful in doing so. Rather, attorneys' fees are appropriate only when the benefits sought are conferred through litigation, by way of a judgment, consent decree, or enforceable settlement agreement. Fee-shifting statutes are not designed to reward citizens for their lobbying efforts.

The court of appeals thus committed no error in concluding that an award of attorneys' fees is inappropriate in this case. Even if this Court holds, however, that a change in law or regulation can establish, by itself, prevailing party status, that does not provide a reason for overruling the standard established in *S-1*. Such a change may provide a fourth route for obtaining fees, but it should not call into question the court of appeals' requirement that no fees are otherwise available absent one of the three criteria set forth in *Farrar*.

CONCLUSION

For the reasons stated, the judgment of the United States Court of Appeals for the Fourth Circuit should be affirmed.

Respectfully submitted,

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

MAUREEN M. DOVE
ANDREW H. BAIDA*
Assistant Attorneys General
200 St. Paul Place, 20th Floor
Baltimore, Maryland 21202
(410) 576-6318

Counsel for *Amici* States

**Counsel of Record*

December 20, 2000

Dec 19, 2000

No. 99-1848

Supreme Court, U.S.
FILED
DEC 19 2000
CLERK

In the
Supreme Court of the United States

BUCKHANNON BOARD AND CARE HOME, INC.; THE WEST VIRGINIA RESIDENTIAL BOARD AND CARE HOME ASSOCIATION; and on behalf of all others similarly situated,

Petitioners,

v.

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

M. REED HOPPER
Counsel of Record
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

Counsel for Amicus Curiae
Pacific Legal Foundation

BEST AVAILABLE COPY

QUESTION PRESENTED

Is the "catalyst theory" available for the recovery of attorney's fees under federal fee-shifting statutes?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

IDENTITY AND INTERESTS OF AMICUS CURIAE 1

STATEMENT OF THE CASE 2

SUMMARY OF THE ARGUMENT 3

ARGUMENT 4

I. THE "CATALYST THEORY" IS FUNDAMENTALLY UNFAIR 5

A. Voluntary Change of Behavior Is Not a Concession 6

B. The "Catalyst Theory" Compounds the Inequity in the Enforcement of the Fee-Shifting Statutes 8

C. The "Catalyst Theory" Does Not Fairly Balance the Rights of the Parties 9

II. THE "CATALYST THEORY" IS BAD PUBLIC POLICY 10

A. A Voluntary Change in Behavior Catalyzed by Litigation May Itself Be Illegal 10

B. The "Catalyst Theory" Engenders Confusion and Unnecessary Litigation 12

C. The "Catalyst Theory" Discourages Voluntary Action 14

III. THE "PREVAILING PARTY" STANDARD OF *FARRAR* IS SUFFICIENT TO DETER MOST VIOLATIONS 15

CONCLUSION 19

TABLE OF AUTHORITIES

Page

Cases

Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources, 2000 U.S. App. LEXIS 720 (4th Cir. 2000) (unpublished) 2

Christiansburg Garment Co. v. Equal Employment Opportunity Commission, 434 U.S. 412 (1978) 8

City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283 (1982) 17-18

Farrar v. Hobby, 506 U.S. 103 (1992) ..... *passim*

Gwaltney v. Chesapeake Bay Foundation, Inc., 484 U.S. 49 (1987) 15

Mooney v. Holohan, 294 U.S. 103 (1935) 6

Morris v. City of West Palm Beach, 194 F.3d 1203 (11th Cir. 1999) 5

National Mining Association v. United States Army Corps of Engineers, 145 F.3d 1399 (D.C. Cir. 1998) 11

Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville, 508 U.S. 656 (1993) 17

Parham v. Southwestern Bell Telephone Company, 433 F.2d 421 (8th Cir. 1970) 4-5

Rochin v. California, 342 U.S. 165 (1952) 6

TABLE OF AUTHORITIES—Continued

Page

S-1 and S-2 v. The State Board of Education of North Carolina, 6 F.3d 160 (4th Cir. 1993) 12-14

United States v. Concentrated Phosphate Export Assn., Inc., 393 U.S. 199 (1968) 17

United States v. W. T. Grant Co., 345 U.S. 629 (1953) 17-18

United States Constitution

U.S. Const. Art. III 16

Statutes

42 U.S.C. § 1988 6

§§ 3601, *et seq.* 2

§ 3613(c)(2) 4

§§ 12101, *et seq.* 2

§ 12205 4

Rules of the Supreme Court

Supreme Court Rule 37 1

37.6 1

Miscellaneous

Gregory C. Sisk, *The Essentials of the Equal Access To Justice Act: Court Awards of Attorney's Fees for Unreasonable Government Conduct (Part One)*, 55 La. L. Rev. 217 (1994) 13

H.R. No. 1558, 94th Cong., 2d Sess. at 7 (1976) 7

TABLE OF AUTHORITIES—Continued

Page

Joel H. Trotter, *The Catalyst Theory of Civil Rights Fee Shifting After Farrar v. Hobby*, 80 Va. L. Rev. 1429 (1994) 8, 16-19

S. Rep. No. 1011, 94th Cong., 2d Sess. at 5 (1976) 7

IDENTITY AND INTERESTS OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37,[1] Pacific Legal Foundation (PLF) respectfully submits this Brief Amicus Curiae in Support of Respondents, West Virginia Department of Health and Human Resources, *et al.* Written consent for amicus participation in this case was granted by counsel for all parties and lodged with the Clerk of this Court.

Pacific Legal Foundation is a nonprofit, tax-exempt organization incorporated to litigate important matters of public interest. PLF has thousands of supporters nationwide and advocates a balanced approach to dealing with public interest issues. PLF supports the concept of limited government and believes public policies should reflect a careful assessment of the social and economic costs and benefits involved. Governmental action, including the application of prudential standards in the courts, should be fair and evenhanded.

This case requires this Court to address whether the "catalyst theory" of fee awards, created by the lower courts, is viable under Supreme Court precedent. This is an issue of great public import because that theory requires public and private defendants to pay substantial attorney's fees without a determination of the merits of the lawsuit or an enforceable order. This Court's determination will either encourage or discourage voluntary settlement of significant cases under federal civil rights and environmental laws. PLF litigates such cases and will be directly affected by this determination. A consideration of a broad spectrum of perspectives, including those of the Pacific Legal Foundation, is, therefore, warranted.

---

[1] Pursuant to Supreme Court Rule 37.6, Amicus Pacific Legal Foundation states that no counsel for a party to this action authored any portion of this brief and that no person or entity, other than Amicus, made a monetary contribution to the preparation or submission of this brief.

PLF has a long history of amicus participation in this Court and believes its public policy perspective on this issue will provide a helpful and necessary viewpoint in this case.

STATEMENT OF THE CASE

Buckhannon Board and Care Home, Inc., operates a care home for elderly people requiring assistance in their daily living. The home failed a fire inspection because it housed residents incapable of self-preservation, in violation of West Virginia law. Buckhannon brought an action for declaratory relief, arguing the law violated the federal Fair Housing Amendments Act (FHAA), 42 U.S.C. §§ 3601, *et seq.*, and the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101, *et seq*. While the action was pending, West Virginia changed the state law to delete the self-preservation requirement. This change in state law mooted the case.

Although the law was not changed through an enforceable order, Buckhannon claimed it was entitled to attorney's fees as a "prevailing party" under the so-called "catalyst theory." Under that theory, Buckhannon argues, "it obtained the relief it sought through the defendants' voluntary conduct because it filed this action and brought to the state's attention the flaws in the law" and so should be deemed a "prevailing party." *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 2000 U.S. App. LEXIS 720 (4th Cir. 2000) (unpublished).

The Fourth Circuit held, under circuit and Supreme Court precedent, that to qualify as a "prevailing party," the plaintiff must, through the litigation, "obtain an enforceable judgment . . . or comparable relief through a consent decree or settlement." *Id.* Arguing a conflict among the circuits, Buckhannon petitioned the Supreme Court to consider whether the "catalyst theory" is viable. This Court granted review.

SUMMARY OF THE ARGUMENT

It is fundamentally unfair to require a party to pay substantial attorney's fees without any showing of wrongdoing or legal obligation. A voluntary change of behavior is not a concession of guilt as the so-called "catalyst theory" implies. A defendant may change his behavior for many reasons, not all related to the merits of the lawsuit, including simple generosity. In such cases, there is no reason in fairness and justice why the defendant should pay fees and costs to the plaintiff who has yet to prove his case. It is neither fair nor just to require the payment of attorney's fees for voluntary cessation of a legal practice.

The expansive, court-created "catalyst theory" unduly favors plaintiffs. That theory requires a defendant, who voluntarily complies, to pay hefty fees and give up his right to continue a potentially legal practice while the plaintiff gives up nothing and enjoys the windfall of the court's largess at the expense of the defendant. Such unfair treatment in the courts defies all sense of fair play and decency and should not be allowed.

The "catalyst theory" is bad public policy. In some cases, changes in conduct induced by litigation may not only be legally unnecessary but contrary to the law, as demonstrated by citizen suits filed under the Clean Water Act. Additionally, the "catalyst theory" causes confusion and prolongs litigation as courts are required to determine whether a change of conduct was favorable to the plaintiff and induced by the lawsuit or something else. Instead of providing a clear standard for the award of attorney's fees, the "catalyst theory" requires the lower courts to tread a tenuous path of causation to determine if the plaintiff prevailed. A legislative change, as occurred in this case, is particularly troubling because the reasons for the change are sure to be more political than legal. Thus, the "catalyst theory" unduly burdens the courts and introduces unnecessary

uncertainty into the litigation process. Moreover, the theory discourages voluntary compliance as defendants come to fear that their change of conduct may result in a fee award. As a deterrent to voluntary conduct, the "catalyst theory" may do more public harm than good.

In contrast to the "catalyst theory," the requirement this Court established in *Farrar v. Hobby* for prevailing party status is clear and certain. Plaintiffs who meet the *Farrar* standard and become entitled to "enforce a judgment, consent decree, or settlement" will qualify for attorney's fees, but not in a manner designed to penalize voluntary defendants. A plaintiff who obtains an enforceable order is clearly more deserving of an award of attorney's fees than one who merely induced a change of conduct. In addition, the *Farrar* standard does not deter the plaintiff from vindicating a right but it does allow the courts to prevent defendants from systematically avoiding fee liability by changing their practices. Therefore, this Court should reject the "catalyst theory" in favor of an enforceable judgment, consent decree, or settlement.

ARGUMENT

The FHAA and ADA, under which this case was brought, both provide:

> [T]he court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs.

42 U.S.C. § 3613(c)(2) and 42 U.S.C. § 12205.

In Petitioners' view, the "catalyst theory" dictates that a party becomes a "prevailing party" when the party merely "achieves a favorable result from the lawsuit." Petitioner's Brief (Pet. Brief) at 37. That theory was created by the Eighth Circuit in *Parham v. Southwestern Bell Telephone Company*, 433 F.2d 421 (8th Cir. 1970), to get around the plain language of a fee-shifting statute. Notwithstanding the civil rights case

was dismissed and the plaintiff received no monetary judgment or other judicial relief, the court held:

> Although we find no injunction warranted here, we believe Parham's lawsuit acted as a catalyst which prompted the appellee to take action implementing its own fair employment policies and seeking compliance with the requirements of Title VII. In this sense, Parham performed a valuable public service in bringing this action. Having prevailed in his contentions of racial discrimination . . . Parham is entitled to reasonable attorney's fees.

Id. at 429-30.

But this Court has never "affirmatively upheld the application of the catalyst test." *Morris v. City of West Palm Beach*, 194 F.3d 1203, 1207 (11th Cir. 1999). In fact, the more recent decisions of this Court are inconsistent with the "catalyst theory." For example, in *Farrar v. Hobby*, 506 U.S. 103 (1992), this Court adopted a higher standard for attorney's fees awards and held that a "prevailing party" is one who "becomes entitled to enforce a judgment, consent decree, or settlement." *Id.* at 574. This ruling would seem to preclude the "catalyst theory." But even if that were not the intent of the *Farrar* decision, as Petitioners suggest, this Court should reject the "catalyst theory" as against public policy.

I

THE "CATALYST THEORY" IS FUNDAMENTALLY UNFAIR

It is fundamentally unfair to require a party to pay attorney's fees when that party has no established legal obligation whatsoever to meet the plaintiff's demands in a lawsuit. But this is what the court-created "catalyst theory" requires—a defendant that changes his conduct voluntarily,

before a final judgment, must pay fees and costs without proof of wrongdoing. Thus, that test penalizes innocent parties and violates "the fundamental conceptions of justice which lie at the base of our civil and political institutions," *Mooney v. Holohan*, 294 U.S. 103, 112 (1935), and which define "the community's sense of fair play and decency," *Rochin v. California*, 342 U.S. 165, 173 (1952). Therefore, the "catalyst theory" should be rejected.

A. Voluntary Change of Behavior Is Not a Concession

The reasons defendants may have for changing their behavior in response to a lawsuit are varied and do not imply that the suit has merit or that the defendant is guilty of wrongdoing. For example, a defendant may choose to accede to the demands of the plaintiff because the defendant does not want the public scrutiny the case may bring; or the cost of litigation may be too high, even if the defendant wins the case; or a court battle may cause undue stress; or the time and effort of defending the case may hamper the defendant's ability to accomplish other objectives; or the defendant may wish to avoid the "taint of litigation." The defendant may even concede the case out of pure generosity.

In such cases, there is no reason in fairness and justice why the defendant should pay attorney's fees to the plaintiff. But the "catalyst theory" dictates such a result. So long as the plaintiff achieves a favorable change of behavior, Petitioners argue, the plaintiff is entitled to fees and costs.

However, the "catalyst theory" is based on a false assumption–that the defendant has acted illegally, whereas the defendant has only been accused of wrongdoing. Petitioners claim the legislative history of the Civil Rights Attorney's Fees Award Act, 42 U.S.C. § 1988, supports the use of the "catalyst theory." Pet. Brief at 33. But, that history simply demonstrates a bias in some legislators, and cynically adopted by some

courts, that a defendant in a civil rights suit has acted unconstitutionally without any actual showing of illegal conduct.

> [F]or purposes of the award of counsel fees, parties may be considered to have prevailed *when they vindicate rights* through a consent judgment or without formally obtaining relief.

S. Rep. No. 1011, 94th Cong., 2d Sess. at 5 (1976) (emphasis added).

If there is no formal relief, there has been no decision on the merits. Without a decision on the merits, there can be no assurance the defendant's conduct is contrary to the law. Thus, the defendant may have had no obligation to change the challenged action although the defendant chooses to settle the case. How can the plaintiff vindicate a right that may never have been violated?

> Similarly, after a complaint is filed a defendant might *voluntarily cease the unlawful practice*. A court might still . . . conclude, as a matter of equity that no formal relief, such as an injunction, is needed.

H.R. No. 1558, 94th Cong., 2d Sess. at 7 (1976) (emphasis added).

The statement, "voluntarily cease the unlawful practice," necessarily assumes the conduct of the defendant was illegal. But in this case and others, predicated on the "catalyst theory," there is no finding of illegality. Until the defendant becomes subject to an enforceable judgment, consent decree, or settlement, the defendant may have no recognized legal duty toward the plaintiff whatsoever.

If the defendant voluntarily ceases a *lawful* practice (which must be assumed until proven otherwise), it would be a travesty

to require the defendant to pay fees and costs. This would be a windfall to the plaintiff (surely not intended by Congress) and violate all notions of "fair play and decency." If the purpose of fee-shifting is to encourage the vindication of civil rights, as Petitioners maintain, the "catalyst theory" makes no sense. In fact, it undermines the civil rights of the defendant. A change of behavior on the part of the defendant is not a concession of guilt or wrongdoing. Therefore, it would be fundamentally unfair to require the defendant to pay fees and costs on the mere accusation of illegal conduct.

B. The "Catalyst Theory" Compounds the Inequity in the Enforcement of the Fee-Shifting Statutes

It is a matter of record that the courts do not normally grant attorney's fees to prevailing defendants under the fee-shifting statutes. This is particularly true for civil rights cases. *See* Joel H. Trotter, *The Catalyst Theory of Civil Rights Fee Shifting After Farrar v. Hobby*, 80 Va. L. Rev. 1429, 1436 (1994).

Although the language of the attorney's fees provisions of such statutes as the FHAA and ADA is neutral on its face, the defendant is virtually never accorded the same right to fees and costs as the plaintiff. In fact, contrary to the plain meaning of the acts, the courts have erected a significant barrier to the award of attorney's fees to prevailing defendants. Often, a prevailing defendant may only recover fees if the underlying action is deemed frivolous or wholly without merit. *See Christiansburg Garment Co. v. Equal Employment Opportunity Commission*, 434 U.S. 412 (1978) (acknowledging a double standard in fee awards). This double standard for awarding attorney's fees is unfair enough—as well as uncalled for given the neutral language of the statutes—but the unfairness is compounded by the overly expansive standard applied to prevailing plaintiffs under the "catalyst theory." As noted above, the "catalyst theory" holds a defendant liable to the

plaintiff for fees and costs even when the defendant's change in conduct is wholly gratuitous.

But it adds insult to injury that a defendant is all but certain not to recover the costs of litigation even after a court has determined that the defendant did not violate any law or interfere with the rights of the plaintiff. It passes understanding to say that such blatantly unfair treatment of an innocent party can be squared with "fundamental conceptions of justice." Surely, any requirement that so dramatically favors plaintiffs, like the "catalyst theory" of fee awards, must violate our "community sense of fair play and decency" and should not be countenanced.

C. The "Catalyst Theory" Does Not Fairly Balance the Rights of the Parties

Another fact attesting to the fundamental unfairness of the "catalyst theory" is the unequal exchange that occurs when a defendant voluntarily complies with the demands of the plaintiff in a lawsuit. A defendant may voluntarily change his conduct, as established above, for varied reasons, many of which do not go to the merits of the case. In fact, before a judicial determination of the case is made, at the point where the "catalyst theory" comes into play, the defendant may have no legal obligation whatsoever to change the contested behavior. So, when the defendant voluntarily modifies the challenged conduct, the defendant gives up the right (often forever) to continue offending behavior, even if the conduct were legal in all respects.

But, under the "catalyst theory," the plaintiff gives up nothing in exchange. To the contrary, the plaintiff is entitled to attorney's fees and costs upon the defendant's voluntary compliance just as if the plaintiff had won a favorable judgment on the merits of the suit. This is fundamentally unfair. Why should a defendant have to give up a legal right and pay fees as well?

A more balanced approach would require both sides to give something up to avoid unnecessary or prolonged litigation. Since the defendant gives up a right to continue what may be perfectly legal conduct, it is only fair that the plaintiff forego something in return; namely, the award of attorney's fees. After all, the plaintiff has not won the case or otherwise established an entitlement to have the challenged conduct changed.

Against the defendant, the "catalyst theory" is clearly punitive. This may not offend one's "sense of fair play" if the defendant is presumed to have acted illegally, but no such presumption is warranted. The presumption of guilt without proof is incompatible with the concept of ordered liberty, which the Constitution was designed to ensure, and unacceptable in our democratic society. Nevertheless the "catalyst theory" implies such a presumption. How else could the courts justify imposing a fee award against an innocent party?

The "catalyst theory" simply does not square with any reasonable "conceptions of justice" nor accord with a modern "sense of fair play and decency." It imposes a monetary obligation on a defendant to pay attorney's fees to a plaintiff without any showing of actual wrongdoing—even when the defendant acts against his own interests by voluntarily changing his conduct. Therefore, this Court should adhere to the fee-award standard enunciated in *Farrar* that a prevailing party is only one who "becomes entitled to enforce a judgment, consent decree, or settlement." 506 U.S. at 574.

II

THE "CATALYST THEORY" IS BAD PUBLIC POLICY

A. A Voluntary Change in Behavior Catalyzed by Litigation May Itself Be Illegal

In some cases, a suit may induce, rather than deter, illegal conduct and still require the defendant to pay fees and costs to

the plaintiff under the "catalyst theory." The facts in *National Mining Association v. United States Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998), are instructive. Under Section 404 of the Clean Water Act, the Army Corps of Engineers may issue permits for the discharge of dredged or fill material into the navigable waters of the United States.

> In 1986 the Corps issued a regulation defining the term "discharge of dredged material," as used in § 404, to mean "any addition of dredged material into the waters of the United States," but expressly excluding "*de minimis*, incidental soil movement occurring during normal dredging operations." 51 Fed. Reg. 41,206, 41,232 (Nov. 13, 1986). In 1993, responding to litigation, the Corps issued a new rule removing the *de minimis* exception and expanding the definition of discharge to cover "any addition of dredged material into, *including any redeposit of dredged material within*, the waters of the United States."

Id. at 1401 (emphasis in original).

For almost a decade, the Army Corps of Engineers had maintained that it was prohibited by the Clean Water Act from regulating "de minimis incidental soil movement." But after the Corps was sued by numerous environmental organizations for not regulating small redeposits of soil, the Corps sought to comply with the plaintiff's demand and voluntarily agreed to regulate the very activity it had steadfastly asserted it could not regulate. The revised Corps regulation was challenged in court by various trade associations whose members engage in dredging and excavation. Ultimately, the Court of Appeals for the District of Columbia ruled the Corps had exceeded its authority under the Clean Water Act and invalidated the revised rule. *See National Mining Association*, 145 F.3d 1399.

That case illustrates the absurdity of the "catalyst theory." In response to a lawsuit a defendant may choose to comply with the plaintiff's demands, but that compliance may not be required or even allowed by law. How can the courts justify awarding attorney's fees to a plaintiff who has induced conduct that is either not required by law or itself illegal?

B. The "Catalyst Theory" Engenders Confusion and Unnecessary Litigation

The virtue of the "prevailing party" definition given by this Court in *Farrar* is clarity and certainty. In that case, this Court held that a party prevails only when the party "becomes entitled to enforce a judgment, consent decree, or settlement." 506 U.S. 574. These are discreet, easily identified conclusions to the litigation process. In contrast, however, the expansive "catalyst theory" raises more questions than it answers and requires further litigation to determine whether the change of conduct was favorable to the plaintiff and was induced by the lawsuit or some other factor.

> Too frequently, legal battles over attorneys' fees merely add another round of protracted litigation to what already has been protracted litigation on the merits of a claim . . . . This collateral litigation over attorneys' fees is often more heated, more arcane, and over far higher monetary stakes than the underlying lawsuit. The relationship of all of this activity to the larger public good is becoming increasingly difficult to discern. Farrar's crucial insights are that the refuge from such litigation lies in a clearly established rule for fee recovery and that the catalyst-based approach to fee applications has left us utterly at sea.

S-1 and S-2 v. The State Board of Education of North Carolina, 6 F.3d 160, 171 (4th Cir. 1993) (Judge Wilkinson dissenting opinion later adopted by en banc court on rehearing).

Instead of providing a clear standard for determining the award of attorney's fees, the "catalyst theory" requires the lower courts to follow a gossamer thread of purported causation to determine if a party has prevailed. A change in course dictated by a legislative body, as in this case, is particularly troubling because the reasons for the change are likely to be more political than legal. Legislators may change a law that moots a case not because the original enactment was indefensible but because they may wish to show they are not petty or to demonstrate their largess, or even to curry favor with the electorate.

> Except in rare circumstances, it would seem presumptuous indeed for a party litigating a case pending in the courts to contend that his or her initiation of a lawsuit compelled [the Legislature] to enact new legislation for his benefit. As the United States Court of Appeals for the Fifth Circuit stated in *Milton v. Shalala*, "[t]he mere possibility that [the Legislature] acted because of an individual claimant's suit (or reacted to a large number of similar suits) is too speculative in our view considering the many influences upon members of [the Legislature] in casting votes."

Gregory C. Sisk, *The Essentials of the Equal Access To Justice Act: Court Awards of Attorney's Fees for Unreasonable Government Conduct (Part One)*, 55 La. L. Rev. 217, 285-86 (1994).

Thus, the "catalyst theory" unduly burdens the courts and introduces unnecessary uncertainty into the litigation process. In addition, the "catalyst theory" encourages questionable cases.

> [The] catalyst theory provides incentives for filing marginal, even frivolous, lawsuits. Any change in conduct by the defendant, for whatever reason, may offer a promising payout to attorneys who file a

> complaint, whether or not that complaint has any ultimate legal merit. Section 1988 should not be a license to shake down government officials, nor was it ever intended to be simply "a relief Act for lawyers."

S-1, 6 F.3d at 172.

For this reason, and others, the Court should adopt the standard enunciated in *Farrar*.

C. The "Catalyst Theory" Discourages Voluntary Action

In *S-1 and S-2*, Judge Wilkinson understood that the "catalyst theory" discourages early settlement of a suit because of the continued risk of fees.

> With its reliance on a simple chronology of events to show causation, catalyst theory empowers courts to award fees for any change in behavior that occurs after the filing of a lawsuit, whether or not the court could have ordered that change in conduct. In this way, catalyst theory serves to disable [defendants], who may come to fear that worthwhile changes may be retroactively linked to a lawsuit and result in a hefty bill for attorney's fees.

6 F.3d at 172.

Normally, the risk of losing a case and paying out large attorney's fees would discourage a party from prolonging a questionable case in litigation. This is good public policy as it serves as an incentive to voluntary action and reduces the burden on the courts. However, the threat of the "catalyst theory" has the opposite effect. It deters voluntary action that may result in a fee award. As a deterrent to voluntary action, the "catalyst theory" may do more public harm than good. For example, the theory discourages the defendant from voluntarily

giving more than a court could legally demand. A policy to encourage such conduct is at work in the 60-day notice provisions of various federal environmental statutes.

In *Gwaltney v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987), this Court considered the purpose of the 60-day notice requirement for citizen suits under the Clean Water Act and determined the notice provision would serve no purpose if the defendant could not avoid a citizen suit for past violations by coming into compliance within the notice period. This Court opined that the possibility of avoiding litigation, including the assessment of civil penalties, may induce a defendant to "take some extreme corrective action, such as to install particularly effective but expensive machinery, that it otherwise would not be obliged to take." *Id.* at 61.

But this is a benefit of voluntary compliance that is undermined by the "catalyst theory." That theory discourages early and magnanimous settlement. Therefore, the court-created "catalyst theory" is bad public policy and should be rejected.

III

THE "PREVAILING PARTY" STANDARD OF *FARRAR* IS SUFFICIENT TO DETER MOST VIOLATIONS

In addition to encouraging plaintiffs to vindicate their rights, one of the obvious objectives of the fee-shifting statutes is to deter illegal conduct. But the "catalyst theory" is not required to satisfy these objectives. The *Farrar* standard, along with the mootness doctrine, serves as an adequate deterrent.

Farrar raised the bar on attorney's fees but it did not eliminate the deterrent effect of such awards. Plaintiffs who meet the *Farrar* standard, and obtain an enforceable judgment, consent decree, or settlement still qualify for fees. The threat of

liability for attorney's fees will continue to discourage illegal conduct. Moreover, according to Trotter,

> the incentive for defendants [in a civil rights case] to alter challenged practices before a plaintiff meets Farrar's test should ensure the ultimate legality of institutional behavior. Plaintiffs in those cases would still have a damages claim for the past wrong, and under Farrar, a defendant could not pay damages without rendering the plaintiff a prevailing party.

Trotter, *supra* at 1449.

The question, however, remains whether the "catalyst theory" is necessary to provide an added deterrent given that voluntarily discontinued conduct could be repeated in the future. *Id.* The answer is, "no." While voluntary action may normally moot a case, there is an exception to the mootness doctrine that allows a determination on the merits, notwithstanding the defendant has voluntarily changed his conduct. In appropriate cases, this exception serves as an added deterrent to illegal conduct.

The mootness doctrine operates to ensure that the "cases" and "controversies" requirement of Article III of the Constitution is met and to "avoid advisory opinions on abstract questions of law." *Id.* at 1450. Therefore, to be heard, a plaintiff must have an "ongoing personal stake" in the case. *Id.* at 1450. A lawsuit may become moot if the contested law changes, as in this case, so as to satisfy the plaintiff's claim or render it irrelevant. *Id.* Or, in a suit for injunctive relief, the case may be mooted if the challenged conduct or condition expires before final review. *Id.* Likewise, while the suit is pending, "an opponent may provide full relief, or the parties may dispose of their claims through consent judgment or simple settlement." *Id.*

There is, however, an exception to the mootness doctrine. Under this exception, voluntary cessation of a challenged action may not result in dismissal of the case. Instead, a court may choose to rule on the merits of the case, determine the legality of the practice, and issue an injunction to prevent the defendant from reverting back to the challenged practice. *Id.*

In *United States v. W. T. Grant Co.*, 345 U.S. 629 (1953), the government sought to enjoin a defendant from serving simultaneously as a director of competing corporations. When the director resigned, the defendants argued the case was moot and should be dismissed as a matter of right. However, this Court acknowledged the possibility that the director could reverse his resignation, and since the case also raised an important public policy question in antitrust law, the court retained the case to rule on the merits.

Subsequently, this Court stated in *United States v. Concentrated Phosphate Export Assn., Inc.*, that "[a] case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." 393 U.S. 199, 203 (1968). In *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283 (1982), this Court declared it was "well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *Id.* at 289.

Trotter suggests that more recent case law, such as *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656 (1993), which was decided after *Farrar*, indicates that the voluntary cessation exception will be available in appropriate cases. In *Associated General Contractors*, this Court applied the exception in circumstances similar to those found in a

"catalyst theory" case. The defendants in that case claimed that a challenge to a city ordinance was moot because the ordinance had been repealed and replaced with a new version. This Court rejected the mootness claim and instead applied the exception for voluntary cessation under *Aladdin's Castle*. Thus,

> [b]y invoking the exception for voluntary cessation, a catalytic plaintiff could satisfy Farrar's test for prevailing party status. Upon full adjudication, the plaintiff could obtain an enforceable judgment. The mere ability to do so should in fact provide ample leverage for obtaining a favorable consent decree or settlement. In either case, the plaintiff would satisfy Farrar and become a prevailing party entitled to attorney's fees, subject to certain limitations.

Trotter, *supra* at 1452-53.

Although a court *may* apply the voluntary cessation exception, it need not do so. In *W.T. Grant*, this Court explained that voluntary cessation was but "one of the factors to be considered in determining the appropriateness of granting an injunction against the now-discontinued acts." 345 U.S. 629, 633. Moreover, *Farrar* itself carries some limitations on the use of the voluntary cessation exception: "Whatever relief the plaintiff secures must directly benefit him at the time of the judgment or settlement." *Farrar*, 506 U.S. at 111. As this Court noted, "an enforceable judgment alone is not always enough." *Id.* at 117. Trotter suggests, for example, that a plaintiff might receive a declaratory judgment that a policy is unconstitutional on its face, but without evidence that the policy had ever been enforced the plaintiff could not show, under *Farrar*, that the judgment provided a real benefit to the plaintiff by changing the behavior of the defendant.

Even with these limitations, however, the *Farrar* standard offers a more balanced approach to fee recovery than the gratuitous "catalyst theory." A plaintiff who obtains a judgment, consent decree, or settlement is infinitely more deserving of an award of attorney's fees than one who merely induced a change in conduct. Although the *Farrar* standard is not as advantageous to plaintiffs as the court-created "catalyst theory," it does, as Trotter suggests, "allow courts to prevent defendants from systematically avoiding fee liability by changing their practices." Trotter, *supra* at 1454. Therefore, this Court should reject the "catalyst theory" of fee recovery.

CONCLUSION

The court-created "catalyst theory" is fundamentally unfair. It requires the payment of attorney's fees without any showing of wrongdoing or legal obligation. Clearly, a voluntary change of behavior is not a concession of guilt or illegality as there are many innocent reasons for a defendant to seek early resolution of a lawsuit, including simple generosity. Therefore, any presumption of wrongdoing under the "catalyst theory" is unwarranted. In addition, application of the "catalyst theory" is bad public policy because it may induce illegal compliance, cause confusion, prolong litigation, and discourage voluntary change of behavior. Contrary to the "catalyst theory" that unduly favors plaintiffs, this Court's fee award requirement in *Farrar* strikes a proper balance between the parties. Under *Farrar*, a plaintiff may recover fees with an enforceable judgment, consent decree, or settlement, and the court can prevent systematic violations of the law.

For the foregoing reasons, this Court should reject the "catalyst theory" in favor of the *Farrar* standard .

DATED: December, 2000.

Respectfully submitted,

M. REED HOPPER
Counsel of Record
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, CA 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

Counsel for Amicus Curiae
Pacific Legal Foundation

Supreme Court, U.S.
FILED
DEC 20 2000
CLERK

Dec 20, 2000

No. 99-1848

IN THE

Supreme Court of the United States

BUCKHANNON BOARD AND CARE HOME, INC., *et al.*,
Petitioners,

v.

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF COUNTIES, U. S. CONFERENCE OF MAYORS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

JACQUELINE G. COOPER
SIDLEY & AUSTIN
1722 Eye St., N.W.
Washington, D.C. 20006
(202) 736-8000

PAUL J. WATFORD
SIDLEY & AUSTIN
555 W. Fifth Street
Los Angeles, CA 90013
(213) 896-6000

RICHARD RUDA *
Chief Counsel
JAMES I. CROWLEY
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Suite 345
Washington, D.C. 20001
(202) 434-4850

* Counsel of Record for the *Amici Curiae*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether attorney's fees may be awarded to civil rights plaintiffs where there was no judgment, consent decree, or settlement in their favor and the case was mooted by the legislative action of non-parties without any determination as to whether the defendants violated federal civil rights laws.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
INTEREST OF THE *AMICI CURIAE*	1
STATEMENT	3
SUMMARY OF ARGUMENT	6
ARGUMENT	7
I. THE CATALYST THEORY IS INCONSISTENT WITH THE PLAIN LANGUAGE, PURPOSE, AND LEGISLATIVE HISTORY OF THE ATTORNEY'S FEES STATUTES	7
A. Congress Authorized Attorney's Fee Awards Only Against Violators Of Federal Law	8
B. The Catalyst Theory Is Inconsistent With The Plain Language Of Attorney's Fees Statutes, And Is Therefore Invalid, Because It Does Not Require A Determination That The Defendant Violated Federal Law	15
II. EVEN IF THIS COURT CONCLUDES THAT THE CATALYST THEORY IS VALID AS A GENERAL MATTER, IT SHOULD AFFIRM THE DECISION BELOW AND HOLD THAT THE CATALYST THEORY MAY NOT PROPERLY BE APPLIED IN CASES RENDERED MOOT BY LEGISLATIVE ACTION	20
A. The Catalyst Theory Does Not Provide A Workable Standard To Determine Whether A Plaintiff's Lawsuit Has "Caused" The Passage Or Repeal Of Legislation	21

TABLE OF CONTENTS—Continued

Page

B. The Catalyst Theory Requires Impermissible Judicial Intrusion Into The Legislative Processes Of State And Local Governments 24

CONCLUSION 27

TABLE OF AUTHORITIES

CASES

Page

Alioto v. Williams, 450 U.S. 1012 (1981) 18
Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975) 8
American Constitutional Party v. Munro, 650 F.2d 184 (9th Cir. 1981) 23
American Council of the Blind, Inc. v. Romer, 992 F.2d 249 (10th Cir. 1993) 17
Baumgartner v. Harrisburg Hous. Auth., 21 F.3d 541 (3d Cir. 1994) 16
Bogan v. Scott-Harris, 523 U.S. 44 (1998) 25
Brown v. Gaston County Dyeing Mach. Co., 457 F.2d 1377 (4th Cir. 1972) 13
Brown v. Griggsville Comty. Unit Sch. Dist. No. 4, 12 F.3d 681 (7th Cir. 1993) 17
Chambers v. Nasco, Inc., 501 U.S. 32 (1991) 27
Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978) 6, 9-10, 14
Citizens Against Tax Waste v. Westerville City Sch., 985 F.2d 255 (6th Cir. 1993) 16, 22
Farrar v. Hobby, 506 U.S. 103 (1992) ..... *passim*
Foreman v. Dallas County, 193 F.3d 314 (5th Cir. 1999) 17, 21, 23
Hanrahan v. Hampton, 446 U.S. 754 (1980) 9, 11
Hensley v. Eckerhart, 461 U.S. 424 (1983) 8-9
Hewitt v. Helms, 482 U.S. 755 (1987) 2, 9, 14, 15
Hishon v. King & Spaulding, 467 U.S. 69 (1984) . 19
Kilgore v. City of Pasadena, 53 F.3d 1007 (9th Cir. 1995) 24
Lea v. Cone Mills Corp., 438 F.2d 86 (4th Cir. 1971) 13
Little Rock Sch. Dist. v. Pulaski, 17 F.3d 260 (8th Cir. 1994) 16, 18
Maher v. Gagne, 448 U.S. 122 (1980) 10
Marbley v. Bane, 57 F.3d 224 (2d Cir. 1995) 21

TABLE OF AUTHORITIES—Continued

	Page
Milton v. Shalala, 17 F.3d 812 (5th Cir. 1994)	22
Morris v. City of W. Palm Beach, 194 F.3d 1203 (11th Cir. 1999)	16, 17, 21, 22
Nadeau v. Helgemoe, 581 F.2d 275 (1st Cir. 1978)	16
New Hampshire v. Adams, 159 F.3d 680 (1st Cir. 1998)	16, 21, 22
Newman v. Piggie Park Enters., Inc., 390 U.S. 400 (1968)	9
Parham v. Southwestern Bell Tel. Co., 433 F.2d 421 (8th Cir. 1970)	11, 12, 12-13, 13
Paris v. United States Dep't of Hous. and Urban Dev., 988 F.2d 236 (1st Cir. 1993)	18
Payne v. Board of Educ., 88 F.3d 392 (6th Cir. 1996)	16, 21
Richards v. Griffith Rubber Mills, 300 F. Supp. 338 (D. Or. 1969)	13
Ross v. Horn, 598 F.2d 1312 (3d Cir. 1979)	22
Ruckelshaus v. Sierra Club, 463 U.S. 680 (1983)	18-19, 19
S-1 and S-2 v. State Bd. of Educ., 6 F.3d 160 (4th Cir. 1993), *rev'd*, 21 F.3d 49 (4th Cir. 1994)	*passim*
S-1 and S-2 v. State Bd. of Educ., 21 F.3d 49 (4th Cir. 1994)	4, 5, 18, 24
Spallone v. United States, 493 U.S. 265 (1990)	25
Tenney v. Brandhove, 341 U.S. 367 (1951)	25
Texas State Teachers Ass'n v. Garland Indep. Sch. Dist., 489 U.S. 782 (1989)	24
Zinn v. Shalala, 35 F.3d 273 (7th Cir. 1994)	16
STATUTES	
42 U.S.C. § 1973*l*(e)	8
§ 1988	8

TABLE OF AUTHORITIES—Continued

	Page
§ 2000a-3(b)	8
§ 2000e-5(k)	8, 12
42 U.S.C. §§ 3601 *et seq*	3
§ 3613(c)(2)	4, 8
§§ 12101 *et seq*	3
§ 12205	4, 8
LEGISLATIVE HISTORY	
H.R. Rep. No. 101-485, pt. 2 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303	8
H.R. Rep. No. 100-711 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173	8
H.R. Rep. No. 94-1558 (1976)	*passim*
S. Rep. No. 94-1011 (1976)	8, 9, 11, 18
RULES	
Fed. R. Civ. P. 11	27
Fed. R. Civ. P. 12(b)(6)	19
OTHER AUTHORITIES	
Random House Dictionary of the English Language (2d ed. 1987)	9
Alan Rosenthal, *Legislative Life: People, Process, and Performance in the States* (1981)	22, 25

IN THE

Supreme Court of the United States

No. 99-1848

BUCKHANNON BOARD AND CARE HOME, INC., *et al.*,
Petitioners,

v.

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF COUNTIES, U. S. CONFERENCE OF MAYORS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States.[1] *Amici* and their members have a vital

[1] Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for a party, and no person or

interest in legal issues that affect the exposure of state and local governments to attorney's fee awards and that affect the exposure of state and local legislative decision-making processes to judicial scrutiny. *Amici* have submitted briefs in two other attorney's fees cases before this Court, *Farrar v. Hobby*, 506 U.S. 103 (1992), and *Hewitt v. Helms*, 482 U.S. 755 (1987).

Amici have a compelling interest in the issue presented in this case because their members are often defendants in cases involving fee-shifting statutes and because they believe that the catalyst theory of awarding attorney's fees, which was rejected by the court of appeals below, is inconsistent with the plain language, purpose, and legislative history of attorney's fees statutes. It also is inherently unworkable and exposes state and local governments to potentially unlimited liability for attorney's fees as well as unwarranted and impermissible judicial intrusion into their legislative processes.

Because of the importance of this issue to state and local governments, *amici* submit this brief to assist the Court in its resolution of this case.

---

entity, other than the *amici* and their counsel made a monetary contribution to the preparation or submission of this brief. The parties' written consents to the filing of this brief have been filed with the Clerk of the Court.

STATEMENT

1. Petitioners filed the instant lawsuit to challenge provisions of the West Virginia Code and accompanying regulations under the Fair Housing Amendments Act ("FHAA"), 42 U.S.C. §§ 3601 *et seq.*, and the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101 *et seq.*[2] The challenged provisions required persons residing in residential board and care homes, such as petitioner Buckhannon Board & Care Home, Inc., to be capable of "self-preservation," *i.e.*, to be capable of evacuating themselves without prompting in situations involving imminent danger such as fires.

The gravamen of the complaint was that defendants engaged in unlawful discrimination, including intentional discrimination, against the handicapped and the aged by enforcing the self-preservation requirement. *See, e.g.*, J.A. 83 (Count I, ¶ 54) ("Defendants' actions as described above are taken with the intent to discriminate and have the effect of discriminating against persons with handicaps" in violation of the FHAA); J.A. 86 (Count II, ¶ 66) ("Defendants' actions as described above are taken with the intent to discriminate and have the effect of discriminating against persons with disabilities and the aged" in violation of the ADA). The named defendants included the West Virginia Department of Health and Human Resources, the Office of Health Facility Licensure and Certification, the West Virginia Fire Commission, the West Virginia Office of the State Fire Marshal, the West Virginia State Board of Examiners for Registered Professional Nurses, the State of West Virginia and various state officials in their official capacities, including the Governor, the State Fire Marshal, and the

---

[2] This statement is based on petitioners' amended complaint, which is reproduced in the Joint Appendix ("J.A.") 67-102, and on the opinions of the district court and court of appeals reproduced in the Petition Appendix ("Pet. App.").

individual State Fire Commissioners. J.A. 70-71. The West Virginia Legislature was not a named defendant, nor were any individual members of the West Virginia House or Senate. The complaint sought a judgment declaring West Virginia's self-preservation requirement to be unlawful under the ADA and the FHAA and an injunction prohibiting its enforcement.[3]

During the litigation, the West Virginia Legislature enacted legislation abolishing the "self-preservation" requirement. In light of this development, various defendants filed motions to dismiss the lawsuit as moot. These motions were granted. Because the lawsuit was dismissed as moot, the District Court made no findings as to whether any of the defendants violated the FHAA or ADA as alleged in the complaint.

2. The District Court also denied petitioners' request for attorney's fees. Pet. App. A17-A19. Petitioners had requested fees under the "catalyst theory," arguing that they are "prevailing" parties entitled to fees under the ADA and FHAA.[4] The District Court explained that the "catalyst theory" "deems a plaintiff to have prevailed when he or she obtains some portion of the relief originally sought through a defendant's voluntary conduct, even though no formal judgment in his or her favor has been rendered." *Id.* at A17. The District Court held that this argument was not "viable" because the Fourth Circuit had rejected the catalyst theory in *S-1 and S-2 v. State Bd. of Educ.*, 21 F.3d 49 (4th Cir. 1994) (en banc). Pet. App. A17. Because the District Court concluded that the catalyst theory was not viable, it did not make any findings concerning whether the instant lawsuit was a factor in the legislature's decision to abolish the self-preservation requirement, much less whether any member of either house of the legislature even knew about this lawsuit.[5]

[3] Petitioners originally sought compensatory and punitive damages, but later abandoned this claim. Pet. App. A11.

[4] The ADA provides that a court "in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs." 42 U.S.C. § 12205. The FHAA similarly provides that a court "in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs." 42 U.S.C. § 3613(c)(2).

3. The court of appeals affirmed the District Court's denial of fees in an unpublished, *per curiam* opinion. Pet. App. A4-A8. The panel concluded that it was bound by the *en banc* court's rejection of the catalyst theory in *S-1 and S-2*, and that the District Court had properly applied that decision. *Id.* at A8.

In *S-1 and S-2*, the *en banc* court held that "[t]he fact that a lawsuit may operate as a catalyst for postlitigation changes in a defendant's conduct cannot suffice to establish plaintiff as a prevailing party." 21 F.3d at 51. The court "adopt[ed] as its own" the reasoning contained in the dissenting panel opinion of Judge Wilkinson. *Id.* Judge Wilkinson's dissenting panel opinion identified four reasons for rejecting the catalyst theory: (1) it "conflicts with the plain language" of provisions limiting fee awards to prevailing parties; (2) it "ignores the Supreme Court's recent decisions," including *Farrar v. Hobby*, 506 U.S. 103 (1992); (3) it "engenders confusion and unnecessary litigation" because it fails to set a coherent standard; and (4) it "discourages public officials from taking initiatives to revise outmoded ordinances or to improve institutional conditions" because they "may come to fear that worthwhile changes may be retroactively linked to a lawsuit

[5] The District Court also denied petitioners' request that it invoke its inherent power to award attorney's fees pursuant to the bad faith exception to the American rule, premised upon the alleged bad faith of two of the defendants, the State Fire Marshal and the State Fire Commission. Pet. App. A18-A19. In a later order, the District Court imposed Rule 11 sanctions in the amount of $3,252 on the State Fire Marshal, the State Fire Marshal's office, and the State Fire Commission. J.A. 142-48.

and result in a hefty bill for attorneys' fees." *S-1 and S-2 v. State Bd. of Educ.*, 6 F.3d 160, 170-72 (4th Cir. 1993), *rev'd*, 21 F.3d 49 (4th Cir. 1994) (en banc).

SUMMARY OF ARGUMENT

I. The catalyst theory employed by the lower courts is inconsistent with the plain language, purpose, and legislative history of the attorney's fees statutes. Those statutes authorize the award of attorney's fees to "prevailing" parties. This Court has held that plaintiffs "prevail" when they succeed on the merits of a significant issue in litigation. Thus, a court is authorized to award attorney's fees under the prevailing party provisions only when "it is awarding them against a violator of federal law." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 418 (1978).

Ordinarily, a plaintiff satisfies this requirement by obtaining a judgment, consent decree, or settlement. *See, e.g., Farrar v. Hobby*, 506 U.S. 103, 111 (1992). The legislative history suggests only one other limited scenario where a plaintiff may be deemed to have prevailed without obtaining formal relief: where the plaintiff has secured a ruling on the merits and the defendant's own actions render the need for court-ordered relief unnecessary.

The catalyst theory is inconsistent with the plain language of the attorney's fees statutes and congressional intent, and is therefore invalid, because it does not require a determination that the plaintiff's claims were meritorious, *i.e.*, that the defendant violated federal law. Under the catalyst theory, courts may award attorney's fees when a defendant's voluntary actions, or the actions of non-defendant third parties such as legislative bodies, render a case moot, based merely on a finding that the plaintiff's claims were not frivolous. In fact, courts have awarded attorney's fees under the catalyst theory to plaintiffs who lost on the merits, or who would have lost had the case proceeded to judgment.

Congress, however, intended fee awards to be available only where the plaintiff's claims were in fact meritorious and the relief the plaintiff obtained was necessary to vindicate federally protected rights. Accordingly, the Fourth Circuit correctly concluded that the catalyst theory is invalid.

II. Even if this Court concludes that the catalyst theory is valid as a general matter, it should hold that the doctrine may not properly be applied in cases that are rendered moot by legislative action. In the context of legislative action, the causation inquiry courts must undertake under the catalyst theory is incoherent and utterly unworkable. It is impossible for courts to isolate the impact that a particular lawsuit may have had on a legislative decision from the innumerable other influences that come into play whenever a legislative body deliberates and takes action. The incoherence of the inquiry creates uncertainty for state and local governments concerning their potential liability for attorney's fees, which interferes with their ability to plan for and provide needed services to the public with limited funds.

Moreover, the judicial inquiry into legislative motive that the catalyst theory demands constitutes an impermissible intrusion into the legislative processes of state and local governments. This intrusion threatens to chill the passage of worthwhile reforms.

ARGUMENT

I. THE CATALYST THEORY IS INCONSISTENT WITH THE PLAIN LANGUAGE, PURPOSE, AND LEGISLATIVE HISTORY OF THE ATTORNEY'S FEES STATUTES.

As the court of appeals below correctly recognized, the catalyst theory employed by other circuits for awarding attorney's fees is essentially a judicial creation that has no mooring in the language or purpose of the attorney's fees statutes. In authorizing attorney's fee awards under the civil

rights statutes to "prevailing" parties, Congress authorized fees only when there is some basis for finding that the plaintiff has a meritorious civil rights claim, *i.e.*, that the defendant has violated federal law. The catalyst theory advocated by petitioners and their *amici*, however, permits the award of attorney's fees against a defendant who has never been shown to have violated any law. Accordingly, the catalyst theory cannot be reconciled with the text of the statutory provisions and, therefore, is invalid.

A. Congress Authorized Attorney's Fee Awards Only Against Violators Of Federal Law.

The general rule in American courts is that each party must bear its own attorney's fees. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975). Congress may abrogate that rule by statute. *Id.* at 269. In the absence of congressional authorization, however, federal courts have no power to devise their own fee-shifting rules, regardless of how desirable from a policy standpoint the shifting of fees may seem in a particular context. *Id.*

Congress has authorized attorney's fee awards under the FHAA and ADA, but only to a "prevailing party." 42 U.S.C. § 3613(c)(2) (FHAA); 42 U.S.C. § 12205 (ADA). The fee-shifting provisions of these statutes are modeled on the attorney's fees provision contained in 42 U.S.C. § 1988. *See* H.R. Rep. No. 101-485, pt. 2, at 140 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 423; H.R. Rep. No. 100-711, at 23 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2184. Congress patterned section 1988, in turn, on the attorney's fees provisions of Titles II and VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-3(b) and 2000e-5(k), and the Voting Rights Act Amendments of 1975, 42 U.S.C. § 1973*l*(e). *See* S. Rep. No. 94-1011, at 2 (1976); H.R. Rep. No. 94-1558, at 5 (1976).

The Court has held that plaintiffs "prevail" within the meaning of section 1988 when they "succeed on any

significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). That interpretation is compelled by the plain language of the statutes, since "to prevail" generally means to win or succeed. *Random House Dictionary of the English Language* 1534 (2d ed. 1987). Thus, this Court consistently has held that a "prevailing" plaintiff is one who advances a meritorious civil rights claim. *See Hanrahan v. Hampton*, 446 U.S. 754, 758 n.4 (1980) (per curiam) (attorney's fees provisions "permit the award of counsel fees *only* to a party who has prevailed *on the merits of a claim*") (emphasis added). *See also Farrar v. Hobby*, 506 U.S. 103, 111 (1992) ("to qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief *on the merits of his claim*") (emphasis added); *Hewitt v. Helms*, 482 U.S. 755, 760 (1987) ("[r]espect for ordinary language requires that a plaintiff receive at least some relief *on the merits of his claim* before he can be said to prevail") (emphasis added).

This Court's interpretation of the term "prevailing party" to require success on the merits of a claim also is in accordance with the congressional purpose underlying fee-shifting statutes. Congress enacted these statutes to encourage those whose civil rights have been violated to seek judicial relief, particularly those who cannot afford to hire private counsel. *See Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968); H.R. Rep. No. 94-1558, at 1. Congress emphasized that attorney's fees provisions are necessary to ensure that "those who violate the Nation's fundamental laws" do not "proceed with impunity." S. Rep. No. 94-1011, at 2. By requiring that plaintiffs achieve some success on the merits of their claims before being entitled to an award of attorney's fees, Congress deliberately narrowed the class of defendants against whom such fee awards could be imposed. Thus, as this Court has forcefully stated, "when a district court awards counsel fees to a prevailing plaintiff, it is awarding them

against a violator of federal law." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 418 (1978) (emphasis added).

The Court's decisions have strictly defined the circumstances in which a plaintiff may be deemed to have succeeded on the merits of a significant issue in litigation. Ordinarily, a plaintiff prevails in litigation by obtaining a judgment, consent decree, or settlement. *See, e.g., Farrar*, 506 U.S. at 111. A judgment for the plaintiff obviously reflects a court's determination that the plaintiff's claims are meritorious. Likewise with respect to consent decrees and settlements that afford plaintiffs the relief they sought: though such agreements do not always contain an explicit admission of wrongdoing by the defendant, *Maher v. Gagne*, 448 U.S. 122, 126 n.8 (1980), courts have sensibly treated them as a plaintiff victory that indicates the likely merits of the plaintiff's claims. At the very least, when a defendant voluntarily affords the plaintiff the requested relief through the mechanism of a consent decree or settlement, the defendant chooses to forego his right to contest the merits of the plaintiff's allegations of civil rights violations. Moreover, in the case of settlements and consent decrees, there can be no doubt that the defendant's voluntary actions were prompted by the plaintiff's lawsuit. Thus, the Court has properly concluded in this context that the prevailing party requirement does not condition an award of fees "on a judicial determination that the plaintiff's rights have been violated." *Id.* at 129.

The legislative history of section 1988 confirms Congress' purpose to limit attorney's fee awards to plaintiffs who have vindicated the civil rights laws by advancing meritorious claims against blameworthy defendants. The House and Senate Reports suggest only two scenarios in which an award of attorney's fees would be proper in the absence of a final judgment, consent decree, or settlement. Significantly, in both scenarios, Congress made plain that a favorable ruling

on the merits of at least some of the plaintiff's claims is a prerequisite for the award of attorney's fees.

With respect to the first such scenario, the Senate Report states: "In appropriate circumstances, counsel fees . . . may be awarded pendente lite. Such awards are especially appropriate where a party *has prevailed on an important matter in the course of litigation*, even when he ultimately does not prevail on all issues." S. Rep. No. 94-1011, at 5 (citation omitted) (emphasis added); *see also* H.R. Rep. No. 94-1558, at 8. The Court addressed this legislative history in *Hanrahan v. Hampton*, 446 U.S. 754 (1980), and effectively limited its reach, concluding that "Congress intended to permit the interim award of counsel fees *only* when a party has prevailed *on the merits* of at least some of his claims," whether in the trial court or on appeal. *Id.* at 757-58 (emphases added). The Court rejected the claim that plaintiffs who won reversal of a directed verdict against them could be deemed prevailing parties because they had not established their entitlement to relief on the merits of any of their claims. *Id.* at 758-59. Only where a plaintiff has prevailed on the merits of a claim, the Court stated, "has there been a determination of the 'substantial rights of the parties,' which Congress determined was a necessary foundation for departing from the usual rule in this country that each party is to bear the expense of his own attorney." *Id.* at 758.

The legislative history of section 1988 suggests only one other scenario in which a plaintiff might be entitled to an award of attorney's fees in the absence of a final judgment, consent decree, or settlement. The Senate Report states that "parties may be considered to have prevailed when they vindicate rights . . . without formally obtaining relief." S. Rep. No. 94-1011, at 5. The Senate Report then cites a number of cases, including *Parham v. Southwestern Bell Tel. Co.*, 433 F.2d 421 (8th Cir. 1970), presumably as illustrative examples. Similarly, the House Report observes that, "after a complaint is filed, a defendant might voluntarily cease the

unlawful practice. A court should still award fees even though it might conclude, as a matter of equity, that no formal relief, such as an injunction, is needed." H.R. Rep. No. 94-1558, at 7. The House Report also cites *Parham* as an illustration of this principle.

The *Parham* case warrants closer examination because petitioners and their *amici* rely heavily on the language from the House and Senate Reports as support for the catalyst theory. In addition, a proper understanding of *Parham* is important because it is often cited as the case that first articulated the catalyst theory. *See* Pet. Br. 21. Far from supporting petitioners' argument, *Parham* confirms that the catalyst theory is inconsistent with congressional intent.

Parham was a Title VII case in which the plaintiff sought damages and injunctive relief, both individually and on behalf of a class, to remedy the defendant-employer's racially discriminatory employment practices. The plaintiff did not obtain any relief on his individual claims, as both the district court and the court of appeals found that the defendant had refused to hire the plaintiff for legitimate, non-discriminatory reasons. 433 F.2d at 428. However, the court of appeals concluded—on the merits—that the plaintiff *had established a Title VII violation* with respect to the class claims, in light of the evidence demonstrating that the defendant had unlawfully refused to hire black employees between 1965 and 1967. *Id.* at 426.

The court of appeals nonetheless agreed with the district court that no injunctive relief was warranted because by the time of trial the defendant had voluntarily amended its hiring policies to eliminate the past discriminatory practices. *Id.* at 429. Although the plaintiff had not obtained formal relief on any of his claims, the court of appeals held that he was entitled to an award of attorney's fees as a "prevailing party" under 42 U.S.C. § 2000e-5(k). The court justified the award on the ground that the plaintiff had "prevailed in his

contentions of racial discrimination against blacks generally prior to February, 1967," and his lawsuit had "acted as a catalyst which prompted the [defendant] to take action implementing its own fair employment policies and seeking compliance with the requirements of Title VII." 433 F.2d at 429-30. Thus, attorney's fees were awarded in *Parham* because the court found that the plaintiff had advanced a meritorious civil rights claim (that is, that the defendant had violated the civil rights laws), even though the court ultimately concluded that no judicial action was necessary to remedy the violation.[6]

The legislative history's reliance on *Parham* thus indicates that Congress contemplated awards of attorney's fees in the absence of a judgment, consent decree, or settlement only in the limited circumstance when plaintiffs have obtained a ruling on the merits of at least some of their claims. Indeed, the language of the House Report quoted prominently in the briefs of petitioners and their *amici* (Pet. Br. 24; U.S. Br. 22; Public Citizen Br. 10-11; Friends of the Earth Br. 14) confirms this view by emphasizing that a court may award fees after a defendant voluntarily ceases an "*unlawful* practice," H.R. Rep. No. 94-1558, at 7 (emphasis added), even though the court might conclude, as a matter of equity, that no formal injunctive relief is needed—an exact description of *Parham* itself. Since federal courts do not

---

[6] The other civil rights cases cited in the House and Senate Reports in which plaintiffs recovered attorney's fees in the absence of obtaining formal relief all involved plaintiffs who had won favorable rulings on the merits. *See Brown v. Gaston County Dyeing Mach. Co.*, 457 F.2d 1377, 1383 (4th Cir. 1972) (plaintiff proved Title VII violation with respect to class claims); *Lea v. Cone Mills Corp.*, 438 F.2d 86, 87 (4th Cir. 1971) (plaintiffs proved Title VII violation); *Richards v. Griffith Rubber Mills*, 300 F. Supp. 338, 340-41 (D. Or. 1969) (district court found Title VII violation). The same is true with respect to all of the Title VII cases cited by the Solicitor General as examples of the catalyst theory's early application. *See* U.S. Br. 22 n.11.

issue injunctions except to remedy or prevent violations of the law, this passage merely reiterates Congress' intent to impose attorney's fee awards only on defendants who are "violator[s] of federal law." *Christiansburg Garment Co.*, 434 U.S. at 418.

Petitioners and their *amici* contend that language in this Court's decision in *Hewitt v. Helms*, 482 U.S. 755 (1987), supports the catalyst theory because it suggests that Congress contemplated an additional category of cases beyond those involving judgments, consent decrees, and settlements in which attorney's fees may be awarded. Specifically, petitioners and their *amici* quote the following passage from the Court's opinion (Pet. Br. 25; U.S. Br. 12; Public Citizen Br. 11-12; Friends of the Earth Br. 5):

> It is settled law, of course, that relief need not be judicially decreed in order to justify a fee award under § 1988. A lawsuit sometimes produces voluntary action by the defendant that affords the plaintiff all or some of the relief he sought through a judgment—*e.g.*, a monetary settlement or a change in conduct that redresses the plaintiff's grievances. When that occurs, the plaintiff is deemed to have prevailed despite the absence of a formal judgment in his favor.

Hewitt, 482 U.S. at 760-61.

This Court, of course, has never approved the award of attorney's fees in any case that did not involve a judgment, consent decree, or settlement. More importantly, as the foregoing analysis of the legislative history demonstrates, Congress contemplated the award of attorney's fees in the absence of a judgment, consent decree, or settlement only in an extremely narrow and limited category of cases: where the court determines that the plaintiff has advanced a meritorious civil rights claim, but the defendant's own actions render the need for court-ordered relief unnecessary. Accordingly, in order to be consonant with congressional intent, the language

in *Hewitt* concerning voluntary action by a defendant must be construed to authorize attorney's fees in the absence of a judgment, consent decree, or settlement only when the plaintiff *has otherwise demonstrated a meritorious civil rights claim.* That in fact was the case in *Hewitt*, where the plaintiff won a ruling from the court of appeals that his due process rights had been violated when he was convicted of a misconduct charge based solely on the word of an unidentified informant. *Id.* at 758. Any other construction of the language in *Hewitt* would ignore this Court's holding that Congress authorized awards of attorney's fees only against violators of federal law. Accordingly, the language in *Hewitt* does not support the validity of the catalyst theory which, as demonstrated below, authorizes attorney's fee awards in circumstances where there has been no determination that the defendant violated any law.

B. The Catalyst Theory Is Inconsistent With The Plain Language of Attorney's Fees Statutes, And Is Therefore Invalid, Because It Does Not Require A Determination That The Defendant Violated Federal Law.

The catalyst theory employed by a majority of the circuits today traces its roots to cases like *Parham*, but it extends the circumstances in which attorney's fees may be awarded in the absence of a judgment, consent decree, or settlement far beyond the narrow and limited circumstances described in that case. Indeed, the Solicitor General declines even to use the term "catalyst theory," candidly acknowledging that in reality it is a "shorthand phrase" that "embraces several different approaches to the question presented here." U.S. Br. 8 n.2. Because the catalyst theory indeed encompasses many different "approaches," it is hard to discern any clear limits or boundaries to the theory as applied by the lower courts.

In practice, the catalyst theory now authorizes attorney's fees in *any* case in which post-complaint action by the

defendant (or even by non-defendant third parties such as legislative bodies) has rendered the plaintiff's request for relief moot, regardless of whether the district court made any determination regarding the merits of the plaintiff's claims. *See, e.g., Morris v. City of W. Palm Beach*, 194 F.3d 1203 (11th Cir. 1999) (city amended challenged parade ordinance; no ruling that original ordinance violated First Amendment); *Baumgartner v. Harrisburg Hous. Auth.*, 21 F.3d 541 (3d Cir. 1994) (local housing authority amended development plan to which public housing tenants objected; no ruling that original plan violated federal housing laws); *Citizens Against Tax Waste v. Westerville City Sch.*, 985 F.2d 255 (6th Cir. 1993) (local school board amended challenged policy regarding speakers at public meetings; no ruling that previous policy violated First Amendment). The lower courts have thus created a world that Congress never contemplated, where attorney's fees are routinely awarded to plaintiffs who have never established that the relief they obtained was necessary to vindicate federal rights.

Over the past 25 years, lower courts have developed and followed a two-pronged test to govern application of the catalyst theory, although there is considerable variation in the precise wording of each prong. Under the first prong of the test, courts typically attempt to determine whether there was a "causal connection" between the plaintiff's lawsuit and the relief obtained. *See, e.g., New Hampshire v. Adams*, 159 F.3d 680, 685 (1st Cir. 1998); *Payne v. Board of Educ.*, 88 F.3d 392, 397-98 (6th Cir. 1996). Under the second prong of the test, courts typically permit the award of attorney's fees so long as the plaintiff's claims are not "frivolous, unreasonable, or groundless." *See, e.g., Zinn v. Shalala*, 35 F.3d 273, 274 (7th Cir. 1994); *Little Rock Sch. Dist. v. Pulaski*, 17 F.3d 260, 262 (8th Cir. 1994); *Nadeau v. Helgemoe*, 581 F.2d 275, 281 (1st Cir. 1978). This latter prong is ostensibly designed to screen out cases in which the defendant agreed to afford the plaintiff the requested relief simply to avoid the hassle or

expense of litigation. *See Brown v. Griggsville Comty. Unit Sch. Dist. No. 4*, 12 F.3d 681, 684 (7th Cir. 1993) ("it would be odd to reward with attorney's fees a plaintiff who had induced the defendant to toss him a bone merely to avoid the expense of defending against an unmeritorious suit"). One circuit has established an even lower hurdle for the award of attorney's fees, holding that fees may be awarded so long as the defendant's voluntary action was "not a wholly gratuitous response to an action that in itself was frivolous." *Morris*, 194 F.3d at 1210. *But see American Council of the Blind, Inc. v. Romer*, 992 F.2d 249, 250 (10th Cir. 1993) (plaintiff must show that defendant's conduct in response to lawsuit was "required by law").

The catalyst theory cannot be squared with either the plain language or purpose of the attorney's fees statutes. Essentially, the lower courts have jettisoned the requirement that attorney's fees be awarded only against defendants who have violated federal law. By focusing solely on whether the plaintiff ultimately achieved his desired end (whether through action of a defendant or not), and eliminating any requirement that the court actually determine whether the plaintiff's civil rights claims had merit, the catalyst theory flouts the congressional purpose underlying the attorney's fees statutes and leaves the doctrine with no anchor in the statutory language.

The catalyst theory is particularly problematic and inequitable when it is invoked against defendants who contested the plaintiff's allegations, but were unable to obtain a final ruling on the merits because the actions of a *third party* rendered the case moot. In these situations, there can be no pretense that the attorney's fees were requested based on a determination that *the defendant* violated federal law. *See, e.g., Foreman v. Dallas County*, 193 F.3d 314, 318 (5th Cir. 1999) (state legislature passed law mooting plaintiffs' claims; fees sought from county defendants); *S-1 and S-2 v. State Bd. of Educ.*, 6 F.3d 160, 162 (4th Cir. 1993) (plaintiffs

settled with City Board of Education, mooting case; fees sought against State Board of Education), *rev'd*, 21 F.3d 49 (4th Cir. 1994) (en banc). *Cf. Alioto v. Williams*, 450 U.S. 1012 (1981) (Rehnquist, J., dissenting from denial of certiorari) (noting unfairness of awarding attorney's fees against defendants who attempted to appeal preliminary injunction but were unable to obtain ruling on validity of injunction because case subsequently rendered moot).

The only sense in which some courts consider the merits of the plaintiff's claims is by setting the threshold for fee eligibility at non-frivolousness. But this standard falls far short of what the prevailing party requirement mandates. Congress intended attorney's fee awards to be available only where the plaintiff's claims were in fact meritorious and the relief the plaintiff obtained was necessary to vindicate important federal rights. *See* S. Rep. No. 94-1011, at 2; H.R. Rep. No. 94-1558, at 1. Yet the catalyst theory permits district courts to award attorney's fees to plaintiffs who have obtained their desired outcome through the voluntary action of the defendant (or a non-defendant third party), regardless of whether the court ultimately could have ordered that change in conduct following a trial on the merits.

Indeed, courts have awarded attorney's fees under the catalyst theory to plaintiffs who lost on the merits, or would have lost had the case proceeded to judgment. *See Paris v. United States Dep't of Hous. and Urban Dev.*, 988 F.2d 236 (1st Cir. 1993) (fees awarded where court of appeals ruled *against* plaintiffs on the merits, and Congress passed legislation that overruled court of appeals' decision); *Little Rock Sch. Dist. v. Pulaski*, 17 F.3d 260 (8th Cir. 1994) (fees awarded where district court stated it would have ruled against plaintiffs on the merits had the case not been rendered moot, because challenged actions of defendant school district were lawful). Permitting an award of fees in such circumstances means that "the defendant's reward could be a second lawyer's bill—this one payable to those who wrongly

accused it of violating the law." *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 692 (1983). Had "Congress intended such a novel result . . . it would have said so in far plainer language than that employed here." *Id.* at 693-94.

Unlike petitioners, the Solicitor General recognizes the problems raised by the catalyst theory in this regard, and proposes that courts scrutinize a plaintiff's complaint to determine whether the claims asserted would be capable of withstanding a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. U.S. Br. 27. As an initial matter, it is notable that not a single circuit that awards attorney's fees under the catalyst theory actually uses the Solicitor General's proposed test, and indeed the only authority cited in support of the test is a student law-review note. *See id.* at 27 n.16. More fundamentally, however, the standard proposed by the Solicitor General does not render the catalyst theory consistent with the statutory language. As noted above, Congress intended to permit attorney's fee awards only against defendants who have been determined to be violators of federal law. Whether a plaintiff's complaint has withstood a motion to dismiss (or could withstand a motion to dismiss) obviously does not determine whether a defendant actually violated the law. A motion to dismiss merely tests the legal sufficiency of the plaintiff's allegations, based on the assumption that the plaintiff will be able to adduce facts to support those allegations. *See Hishon v. King & Spaulding*, 467 U.S. 69, 73 (1984). A finding that a plaintiff's claims could meet the very low threshold of withstanding a motion to dismiss therefore is in no sense a substitute for a determination that the plaintiff ultimately would prevail following a trial on the merits. Thus, the test proposed by the Solicitor General is no more adequate to bring the catalyst theory in line with the statutory language and congressional intent than the various standards currently employed by the courts of appeals.

For the foregoing reasons, the catalyst theory employed by the lower courts today cannot be reconciled with the plain language or purpose of the attorney's fees statutes and, therefore, is invalid. The Court should hold that, in the absence of a judgment, consent decree, or settlement, attorney's fees may be awarded only where the plaintiff secures a favorable ruling on the merits and the defendant's own actions have rendered the need for formal, court-ordered relief unnecessary. Since petitioners did not obtain a judgment, consent decree, or settlement in their favor and there has been no determination that respondents violated either the FHAA or the ADA, the District Court correctly refused to award attorney's fees here.

II. EVEN IF THIS COURT CONCLUDES THAT THE CATALYST THEORY IS VALID AS A GENERAL MATTER, IT SHOULD AFFIRM THE DECISION BELOW AND HOLD THAT THE CATALYST THEORY MAY NOT PROPERLY BE APPLIED IN CASES RENDERED MOOT BY LEGISLATIVE ACTION.

The Solicitor General candidly acknowledges, as he must, that cases rendered moot by legislative action raise "particular problems of proof" under the catalyst theory because legislatures may elect to change laws "for policy reasons unrelated to pending litigation." U.S. Br. 29 n.17. *Amici* submit that the catalyst theory is not merely difficult to apply in the context of legislative action, but that it is incoherent and utterly unworkable. Further, the causation inquiry that courts must undertake under the catalyst theory necessarily leads to impermissible and intolerable judicial intrusion into the legislative processes of state and local governments. For these reasons, even if the Court concludes that the catalyst theory is permissible in some form, it should hold that the catalyst theory may not properly be applied in cases, such as

this one, where a lawsuit was rendered moot by legislative action. The decision below should therefore be affirmed.

A. The Catalyst Theory Does Not Provide A Workable Standard To Determine Whether A Plaintiff's Lawsuit Has "Caused" The Passage Or Repeal Of Legislation.

The causation inquiry that is central to the catalyst theory is inherently vague and fails to provide courts with a workable standard. Not surprisingly, no clear standard has emerged to determine when a particular lawsuit can be deemed to have caused a voluntary change in conduct by the defendant, much less whether a particular lawsuit can be deemed to have caused a legislative change undertaken by third parties. The different approaches taken by the circuits in defining the causation inquiry all suffer from the same shortcoming: they provide no meaningful guidance to district courts. For example, the test variously has been phrased as whether the plaintiff's lawsuit was a "catalytic, necessary, or substantial factor in attaining the relief";[7] whether the plaintiff's lawsuit was a "substantial factor or significant catalyst in motivating the defendants to alter their behavior";[8] whether the plaintiff's lawsuit was a "necessary and important factor in achieving the relief desired";[9] and whether the plaintiff's lawsuit "served a provocative function in the calculus of relief."[10] These statements of the causation test are little more than empty formulations that fail to establish a judicially manageable standard.

---

[7] *Marbley v. Bane*, 57 F.3d 224, 234 (2d Cir. 1995) (internal quotation marks omitted).

[8] *Foreman v. Dallas County*, 193 F.3d 314, 320-21 (5th Cir. 1999) (internal quotation marks omitted). *See also Morris v. City of W. Palm Beach*, 194 F.3d 1203, 1209 (11th Cir. 1999).

[9] *Payne v. Board of Educ.*, 88 F.3d 392, 397-98 (6th Cir. 1996) (internal quotation marks omitted).

[10] *New Hampshire v. Adams*, 159 F.3d 680, 685 (1st Cir. 1998).

In practice, then, courts have been forced to rely heavily on a simple chronology of events in determining whether the requisite causal connection is present. *See, e.g., Morris v. City of W. Palm Beach*, 194 F.3d 1203, 1209 (11th Cir. 1999); *Citizens Against Tax Waste v. Westerville City Sch.*, 985 F.2d 255, 257 (6th Cir. 1993); *Ross v. Horn*, 598 F.2d 1312, 1322 (3d Cir. 1979). Chronology can be highly misleading, however, particularly where legislative action has rendered a case moot. Merely because legislation was passed or repealed after the filing of a lawsuit does not mean that the legislature took such action based on an assessment that the lawsuit was meritorious. Yet none of the standards devised by the courts of appeals is capable of reliably separating "coincidence from effect." *New Hampshire v. Adams*, 159 F.3d 680, 685 (1st Cir. 1998).

Moreover, no such standard *could* be devised in this context. It is simply impossible—for a court or anybody else—to isolate the impact that a lawsuit may have had on a legislative decision from the innumerable other influences that come into play whenever a legislative body deliberates and takes action. *See* Alan Rosenthal, *Legislative Life: People, Process, and Performance in the States* 264-65 (1981) (noting role that interest groups, the press, and national legislative trends play in shaping direction of legislative policy). The Fifth Circuit's observations in a case involving congressional action are just as apt with respect to state and local legislative bodies: "The mere possibility that Congress acted because of an individual claimant's suit (or reacted to a large number of similar suits) is too speculative in our view considering the many influences upon members of Congress in casting their votes." *Milton v. Shalala*, 17 F.3d 812, 815 (5th Cir. 1994). Courts are not competent to sift through and weigh the relative importance of competing influences on a legislative body's members, and there is no basis for concluding that, in enacting the fee-shifting statutes, Congress authorized courts to engage in any such endeavor.

Moreover, by requiring courts to engage in this endeavor without a workable standard, the catalyst theory raises the specter of many difficulties for state and local governments and the individuals who serve as state and local officials. *First*, because the catalyst theory fails to provide meaningful guidance to district courts, state and local governments—which are often defendants in cases involving fee-shifting statutes—face considerable uncertainty regarding their potential liability for attorney's fees. Because attorney's fee awards can be a significant burden on the budgets of state and local governments, particularly local governments which endeavor to provide a variety of important services to their constituents with limited resources, this uncertainty interferes with their ability to plan for and provide needed services to the public.

Second, because there is seldom a public record documenting each legislator's reasons for supporting a proposal, the catalyst theory raises the prospect that parties will be compelled to obtain testimony from public officials (whether by way of deposition or affidavit) about why they proposed or voted for a particular piece of legislation. The prospect of courts receiving testimony from public officials to determine the reasons that legislative action was taken gives rise to a number of concerns. For example, courts have held that affidavits from individual legislators, standing alone, are insufficient to establish what motivated the legislature as a collective body to take action. *See, e.g., Foreman*, 193 F.3d at 322; *American Constitutional Party v. Munro*, 650 F.2d 184, 188 (9th Cir. 1981). Obtaining testimony from a large number of state or local legislators in order to establish causation under the catalyst theory would obviously impose an unwarranted burden on elected officials preoccupied with more pressing concerns. Moreover, in the event the district court received conflicting affidavits from various legislators, it presumably would be required to hold an evidentiary hearing to resolve such conflicts and possibly compel elected

officials to testify—a spectacle Congress cannot possibly have intended to authorize when it afforded attorney's fees to prevailing parties. Finally, given the uncertainty that can surround the sequence of events when changes in government policy moot a lawsuit, public officials will be forced to provide such testimony at their peril. *See Kilgore v. City of Pasadena*, 53 F.3d 1007, 1011 n.5 (9th Cir. 1995) (directing district court to investigate mayor for perjury after court of appeals disagreed with mayor's statement in affidavit that city had decided to change policy well before plaintiff filed lawsuit).

In sum, no workable causation standard exists or could be devised under the catalyst theory for addressing the situation where legislative action renders a case moot. The confusion and uncertainty engendered by application of the catalyst theory in this context will inevitably result in the need for protracted and unproductive "satellite litigation" over matters far removed from the core concerns of federal civil rights laws. *See S-1 and S-2 v. State Bd. of Educ.*, 6 F.3d 160, 171 (4th Cir. 1993) (Wilkinson, J., dissenting), *rev'd*, 21 F.3d 49, 51 (4th Cir. 1994) (en banc) (adopting Judge Wilkinson's dissent as opinion of the court). Indeed, the Court's reasoning in *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782 (1989), which rejected the "central issue" test, is fully applicable here: "Creating such an unstable threshold to fee eligibility is sure to provoke prolonged litigation, thus deterring settlement of fee disputes and ensuring that the fee application will spawn a second litigation of significant dimension." *Id.* at 791.

B. The Catalyst Theory Requires Impermissible Judicial Intrusion Into the Legislative Processes of State and Local Governments.

Application of the catalyst theory in the legislative context also implicates concerns of a far graver nature. Even if the catalyst theory provided a reliable means of determining

when a legislative body had changed a law in response to a particular lawsuit, the inquiry demanded of courts would involve an impermissible intrusion into the legislative processes of state and local governments.

This Court has long held that it is "not consonant with our scheme of government for a court to inquire into the motives of legislators." *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951). Yet that is precisely what the catalyst theory requires when legislative action has rendered a case moot. Given the innumerable political, economic, and policy concerns that influence the passage or repeal of legislation, courts attempting to divine causation will necessarily have to probe the motives of those legislators who voted to take a particular legislative action. Judicial inquiry into the reasons that motivated members of state and local legislatures to vote as they did could not be more intrusive on the deliberative processes of those bodies. Such inquiry amounts to "judicial interference" with the "exercise of legislative discretion," and is not permitted by this Court's cases. *See Bogan v. Scott-Harris*, 523 U.S. 44, 52 (1998); *Spallone v. United States*, 493 U.S. 265, 279 (1990).

Judicial inquiry into legislative motive also threatens to chill the passage of worthwhile reforms. State and local governments are constantly alert to new ways of addressing policy issues, and pay particular attention to reforms underway in other jurisdictions. Frequently, state and local governments decide to change their laws as a result of broader law reform efforts that have proved their merit elsewhere. For example, the Council of State Governments frequently proposes model legislation, and the National Conference of State Legislatures and the National Governors' Association are instrumental in transmitting legislative proposals to their members. Rosenthal, *supra*, at 265. Legislators fearful that a change in policy might be "retroactively linked" to a pending lawsuit may hesitate to adopt reforms that they deem to be beneficial and in the

public interest. *See S-1 and S-2*, 6 F.3d at 172 (Wilkinson, J., dissenting).

The record in this case suggests why such hesitancy might be justified if the catalyst theory were applicable. Evidence in the record indicates that the West Virginia Legislature had plausible public policy reasons for repealing the self-preservation regulations at issue in this case in response to a nationwide law-reform movement that began well before petitioners filed suit. Specifically, petitioners themselves point out that the debate over self-preservation requirements was "not unique to West Virginia," and in fact had taken place on a national level following the adoption in 1985 of the National Fire Protection Association's Life Safety Code. Pet. Br. 4. Petitioner's own expert testified that, 20 years ago, "all states had self-preservation requirements for residential care homes," but that a majority of states had abandoned those requirements in light of the proposals set forth in the 1985 Life Safety Code. *Id.* at 5-6. Thus, the West Virginia Legislature may well have been motivated by sound policy concerns in repealing the self-preservation requirements challenged by petitioners, rather than by any concern over the prospect of losing petitioners' lawsuit. In such circumstances, a legislature cognizant of the catalyst theory might decide to delay repeal of the regulations solely to avoid subjecting taxpayers to liability for the opposing party's attorney's fees.

Finally, the suggestion of petitioners' *amici* that the catalyst theory is necessary to prevent gamesmanship by state and local government defendants is implausible at best. *Amici* assert that without the catalyst theory in place, defendants will be likely to moot lawsuits at the last minute by repealing a challenged regulation, rather than risk losing on the merits and being ordered to pay the plaintiff's attorney's fees. *See* Public Citizen Br. 17. However, defendants must incur their own attorney's fees during

litigation, and thus have no incentive to prolong litigation when they are considering a change in the law that may end up mooting the case. In addition, the actions of state and local officials are subject to the scrutiny of the electorate and coverage by the news media. The electoral process and the forces of public opinion are systemic checks against behavior by legislative officials that is motivated by strategic considerations rather than sound legislative decision-making. And at the very least, both the "bad faith" exception to the American rule, which allows attorney's fees to be shifted where litigation tactics are pursued in bad faith, *see Chambers v. Nasco, Inc.*, 501 U.S. 32, 45 (1991), and Federal Rule of Civil Procedure 11, are further checks against such gamesmanship.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

JACQUELINE G. COOPER
SIDLEY & AUSTIN
1722 Eye St., N.W.
Washington, D.C. 20006
(202) 736-8000

PAUL J. WATFORD
SIDLEY & AUSTIN
555 W. Fifth Street
Los Angeles, CA 90013
(213) 896-6000

RICHARD RUDA*
Chief Counsel
JAMES I. CROWLEY
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Suite 345
Washington, D.C. 20001
(202) 434-4850

* Counsel of Record for the *Amici Curiae*

December 20, 2000

Dec 20, 2000

Supreme Court, U.S.
FILED
DEC 20 2000

No. 99-1848

IN THE
Supreme Court of the United States

BUCKHANNON BOARD AND CARE HOME, INC., *et al.*,
Petitioners,

v.

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF LOS ANGELES COUNTY AND CALIFORNIA STATE ASSOCIATION OF COUNTIES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

JEFFREY S. SUTTON
Counsel Of Record
RONALD E. LAYMON
JONES, DAY, REAVIS & POGUE
1900 Huntington Center
41 South High Street
Columbus, OH 43215
(614) 469-3855

ELWOOD LUI
JONES, DAY, REAVIS & POGUE
Suite 4600
555 West Fifth Street
Los Angeles, CA 90013
(213) 489-3939

Counsel for Los Angeles County and California State Association of Counties

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the "catalyst" theory applies to federal fee-shifting statutes?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

RULE 37 STATEMENT 1

STATEMENT OF *AMICI* INTEREST 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. THE FEE-SHIFTING STATUTES PREMISE AWARDS ON A COURT ORDER OR JUDICIALLY-ENFORCEABLE SETTLEMENT ESTABLISHING THAT THE LITIGANT HAS "PREVAIL[ED]" 4

II. PRECEDENT CONFIRMS THIS READING OF THE FEE-SHIFTING STATUTES 7

III. IN REQUIRING PARTIES TO PREVAIL THROUGH A JUDICIAL ORDER OR A JUDICIALLY-ENFORCEABLE SETTLEMENT, THE STATUTE SETS UP A CLEAR TEST THAT WILL STEM VEXATIOUS COLLATERAL-FEE LITIGATION WHILE STILL PERMITTING DESERVING LITIGANTS TO OBTAIN FEES . . 12

CONCLUSION 16

TABLE OF AUTHORITIES

Page

Cases

Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975) 8
Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978) 6
Farrar v. Hobby, 506 U.S. 103 (1992) . . . . . *passim*
Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167 (2000) 4,14
Hanrahan v. Hampton, 446 U.S. 754 (1980) 9,11
Hensley v. Eckerhart, 461 U.S. 424 (1983) 4,6,9,13
Hewitt v. Helms, 482 U.S. 755 (1987) 10,11,12
Kentucky v. Graham, 473 U.S. 159 (1985) 9
Key Tronic Corp. v. United States, 511 U.S. 809 (1994) 3,8
Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375 (1994) 12
Maher v. Gagne, 448 U.S. 122 (1980) 11,12
Norman v. Reed, 502 U.S. 279 (1992) 14
Rhodes v. Stewart, 488 U.S. 1 (1988) 10
Riverside v. Rivera, 477 U.S. 561 (1986) 3
Runyon v. McCrary, 427 U.S. 160 (1976) 8
S-1 and S-2 v. State Bd. of Educ., 6 F.3d 160, (4th Cir. 1993), *rev'd en banc and dissenting opinion adopted*, 21 F.3d 49 (4th Cir.), *cert. denied*, 513 U.S. 876 (1994) 7,9,15
Summit Valley Industries, Inc. v. Local 112, United Broth. of Carpenters and Joiners, 456 U.S. 717 (1982) 8
Texas Teachers Ass'n v. Garland Sch. Dist., 489 U.S. 782 (1989) 9,10
United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1980) 14

Statutes

Americans with Disabilities Act of 1990
42 U.S.C. § 12117(a) 1
42 U.S.C. § 12188 1
42 U.S.C. § 12205 4
Civil Rights Attorney's Fees Awards Act of 1976
42 U.S.C. § 1988 . . . . . *passim*
Fair Housing Amendments Act of 1988,
42 U.S.C. § 3601 *et seq.* 4
42 U.S.C. § 3613(c)(2) 1
Voting Rights Act
42 U.S.C. § 19731(e) 1

Miscellaneous

Black's Law Dictionary (7th ed. 1999) 5

RULE 37 STATEMENT

Counsel for the *amici curiae* authored this brief in whole and received no financial or other assistance from any other person or entity in doing so. The parties have consented to the filing of this brief, and their consent letters are on file with the Clerk's office.

STATEMENT OF *AMICI* INTEREST

Congress has enacted a variety of laws that authorize attorney-fee awards to successful plaintiffs and defendants. *See, e.g.*, 42 U.S.C. § 1988 (Civil Rights Attorney's Fees Awards Act of 1976); 42 U.S.C. § 3613(c)(2) (Fair Housing Amendments Act of 1988); 42 U.S.C. §§ 12117(a), 12188 (Americans with Disabilities Act); 42 U.S.C. § 1973l(e) (Voting Rights Act). In statutorily altering the "American Rule"—that customarily requires litigants to pay their own costs when they ask courts to resolve disputes—Congress has indicated that only "prevailing" parties are eligible for fees. At issue in this case is whether litigants may obtain fees even when they do not obtain a judgment or judicially-enforceable settlement over a contested issue, but instead claim merely to have been the "catalyst" of the other party's voluntary action to dismiss a case or alter challenged conduct.

Amici curiae are Los Angeles County and the California State Association of Counties. Both have a considerable stake in the outcome of this dispute and both believe that the "catalyst" theory cannot be squared with the words of the fee-shifting statutes, precedent or common sense.

As of January 2000, Los Angeles County had a population of 9.9 million residents, making it the most populous county in the nation and making it more populous than 42 States in the country. Roughly 29 percent of the residents of California—the most populous State—live in Los Angeles County.

As a subdivision of the state, the County is charged with providing numerous services that affect the lives of all

residents. Traditional mandatory services include law enforcement, property assessment, tax collection, public health protection, public social services and relief to indigents. Among the specialized services are flood control, water conservation, parks and recreation, and many diversified cultural activities. There are 88 cities within the County, each with its own city council. All of the cities, to one degree or another, contract with the County to provide municipal services. Thirty-seven cities contract for nearly all of their municipal services. More than 65% of the County is unincorporated. For the 1 million people living in those areas, the Board of Supervisors of Los Angeles County is their "city council" and County departments provide the municipal services.

The California State Association of Counties (CSAC) is a non-profit corporation, whose membership consists of all 58 California counties. Those counties range in population from nearly ten million to several hundred thousand. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the State. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

Both Los Angeles County and the counties represented by CSAC face claims for attorney fees by private plaintiffs under 42 U.S.C. § 1988 and other fee-shifting statutes enacted by Congress. Each entity thus has a considerable interest in ensuring that statutes providing for attorney fees are not construed more broadly than Congress intended and that fees are awarded only where Congress has deliberately departed from the traditional "American" rule that each party bears its own litigation expenses.

SUMMARY OF ARGUMENT

The "catalyst" theory does not respect the words of the fee-shifting statutes, precedent or the everyday realities of government litigation.

As a matter of plain English, the fee-shifting statutes do not by their terms create "a relief Act for lawyers." *Farrar v. Hobby*, 506 U.S. 103, 122 (1992) (O'Connor, J., concurring) (quoting *Riverside v. Rivera*, 477 U.S. 561, 588 (1986) (Rehnquist, J., dissenting)). They apply only to "prevailing" plaintiffs and "prevailing" defendants, not to any party or any legal dispute. When combined with each statute's repeated reference to a relevant "party" and "action," the term "prevailing" requires fee-requesting litigants to obtain success through a court order or judicially-enforceable settlement that alters the legal relationship between the parties. A claim that one litigant has inspired, prompted, or catalyzed another litigant voluntarily to alter its conduct does not suffice.

As a matter of precedent, the Court's historic presumption against shifting responsibility for attorney fees bolsters this interpretation. In adhering to this "American rule," the Court has indicated "that attorney's fees generally are not a recoverable cost of litigation absent explicit congressional authorization." *Key Tronic Corp. v. United States*, 511 U.S. 809, 824 (1994) (quotation omitted). Congress's mere authorization of fees for "prevailing" parties hardly amounts to an "explicit" warrant to shift fees whenever litigants ineffably inspire change, as opposed to compel it. The Court's cases interpreting these provisions all follow this course. To be a "prevailing" party, the litigant must make a two-part showing. One, it " must obtain an enforceable judgment ... or comparable relief through a consent decree or settlement." *Farrar*, 506 U.S. at 111. Two, "[w]hatever relief the plaintiff secures must directly benefit him at the time of the judgment or settlement." *Id.* The litigant in other words must achieve the *end* of a direct benefit that alters the legal relationship between

the parties through the *means* of an enforceable judgment or judicially-enforceable settlement.

As a matter of mundane litigation realities, this interpretation also makes sense. For one, the clarity of this rule will preclude plaintiffs and defendants, both of whom after all may be treated as "prevailing" parties, from commencing time-consuming satellite litigation over fee awards. The vexing state-of-mind and cause-and-effect inquiries compelled by the "catalyst" theory, by contrast, will catalyze all manner of collateral fee litigation. "A request for attorney's fees," the Court has warned, "should not result in a second major litigation." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). For another, a defendant's voluntary cessation of a challenged practice will not invariably deprive a federal court of its power to determine the legality of a challenged practice. Because the defendant bears a "heavy burden" of showing that the conduct will not recur, it is not the case that institutional litigation by civil rights plaintiffs will invariably stop merely because the defendant appears to end its challenged conduct. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 189 (2000).

ARGUMENT

I. THE FEE-SHIFTING STATUTES PREMISE AWARDS ON A COURT ORDER OR JUDICIALLY-ENFORCEABLE SETTLEMENT ESTABLISHING THAT THE LITIGANT HAS "PREVAIL[ED]."

> In a civil *action* under subsection (a) of this section, the court, in its discretion, may allow *the prevailing party*, other than the United States, a reasonable attorney's fee.

Fair Housing Amendments Act of 1988, 42 U.S.C. § 3601 *et seq.* (FHAA), 42 U.S.C. § 3613(c)(2) (emphasis added).

> In any *action* or administrative proceeding commenced pursuant to this chapter, the court or agency, in its discretion, may allow *the prevailing party*, other than the United States, a reasonable attorney's fee.

Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12205 (emphasis added).

> In any *action* or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 . . ., or title VI of the Civil Rights Act of 1964 . . ., the court, in its discretion, may allow *the prevailing party*, other than the United States, a reasonable attorney's fee as part of the costs.

Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (emphasis added).

All three of the pertinent statutes—the ADA and FHAA, as at issue here, and section 1988, as at issue in most cases—say that a district court's discretion to grant attorney fees does not apply to any legal "action" or at any time during that legal action. Only when a "party" has "prevail[ed]" on the merits, each law makes clear, may trial courts exercise the discretion Congress has given them to shift attorney fees from one litigant to the other in an "action" before them.

As the references to "party" and "action" in each of these statutes suggests, a "prevailing" litigant is not one who inspires change in governmental conduct but one who obtains a court order (or judicially-enforceable settlement) compelling it. No doubt that court order may come in a variety of forms, be it a temporary restraining order, preliminary injunction, judgment, settlement, consent decree or something else. But some judicially-enforceable directive must change the legal relationship between the parties. After all, one only "prevail[s]" in a lawsuit when an issue is mutually contested and a resolution is mutually enforceable, not when there is one-sided alteration in conduct. *See* Black's Law Dictionary, 1145

(7th ed. 1999) (defining "prevailing party" as "[t]he party to a suit who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not necessarily to the extent of his original contention").

A contrary rule—that ineffably asks whether one litigant was a "catalyst" of the other litigant's change in behavior—has no statutory mooring and no coherent principle to guide it. Unless tethered to a judicially-enforceable directive concerning a contested issue, an inquiry into "prevailing party" status will force lower courts into utterly speculative debates over why parties voluntarily dismiss cases or voluntarily change their conduct after cases are filed.

Take plaintiffs who choose voluntarily to dismiss their claims against government defendants. They of course are no more immune from attorney-fee awards than defendants. Prevailing defendants, like prevailing plaintiffs, may invoke these fee-shifting statutes, which by their terms apply to any "prevailing party" and any "action." *See Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978) ("a district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith"); *Hensley v. Eckerhart*, 461 U.S. 424, 433 n. 7 (1983) (Title VII and section 1988 apply the same fee-shifting "standard[]"). On what basis, however, would a trial court determine whether the defendant had "prevail[ed]" in such a case? In one sense, a plaintiff's decision voluntarily to dismiss a claim would seem to be the epitome of an "action [that] was frivolous, unreasonable, or without foundation." *Christiansburg Garment Co.*, 434 U.S. at 421. Why else dismiss a case that one has initiated? But in another sense, that may not be true—as a civil-rights plaintiff may voluntarily dismiss an action for an endless assortment of reasons. They may decide that other lawsuits deserve more priority; they may decide to challenge the

underlying government policy in the legislature rather than in the courts; or their lead lawyer may simply change jobs. One's capacity for imagination is the only limit to the number of possibilities.

So too with government defendants. Like private plaintiffs, they may choose voluntarily to change their conduct for a variety of reasons—many of which have little if anything to do with the merits of the case or, more precisely, with prevailing-party status. An election may lead to a new government proposal on the underlying policy issue at stake in the litigation; an intervening precedent may change the legal landscape; or the legislature may change a law based on policy, as opposed to federal constitutional or statutory, grounds. At bottom, it is no more possible fairly to label a government defendant a "prevailing" party than it is to label a private plaintiff that way—at least in the absence of a judicial order (or judicially-enforceable settlement) resolving a contested issue.

In the final analysis, the fee-shifting statutes by their terms require a legal as opposed to a causal connection between the lawsuit and the end result. "For individuals to recover fees, they must prevail in their status as parties, not in their role as agents of reform." *S-1 and S-2 v. State Bd. of Educ.*, 6 F.3d 160, 170 (4th Cir. 1993) (Wilkinson, J., dissenting), *rev'd en banc and dissenting opinion adopted*, 21 F.3d 49 (4th Cir.), *cert. denied*, 513 U.S. 876 (1994).

II. PRECEDENT CONFIRMS THIS READING OF THE FEE-SHIFTING STATUTES.

Even if there were doubt regarding the meaning of these statutes, precedent resolves that doubt against petitioners in at least two ways. First, the presumption against such awards confirms that any ambiguity regarding "prevailing" party status should be construed against disrupting the American Rule. Second, the Court's cases have frequently indicated that a

judicial order regarding a contested issue, not an unbridled inquiry into causation, establishes "prevailing" party status.

While the words of the fee-shifting statutes alone answer the question presented, the presumption against such fee awards cements the conclusion. "Our cases establish," the Court has indicated, "that attorney's fees generally are not a recoverable cost of litigation 'absent explicit congressional authorization.'" *Key Tronic Corp. v. United States*, 511 U.S. 809, 824 (1994) (quoting *Runyon v. McCrary*, 427 U.S. 160, 185) (1976)). "[T]he availability of attorney's fees therefore requires a determination that 'Congress intended to set aside this longstanding American rule of law.'" *Id.* (quoting *Runyon*, 427 U.S., at 185-186). *See also Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975) (even "the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser"); *Summit Valley Industries, Inc. v. Local 112, United Broth. of Carpenters and Joiners*, 456 U.S. 717, 727 (1982) ("the American Rule presumes that the word 'damages' means damages exclusive of fees"). Whatever else may be said about the terms of these statutes, the mere phrase "prevailing party" does not overcome this presumption when it comes to a decision by a plaintiff on the one hand voluntarily to dismiss a suit or by a public defendant on the other hand voluntarily to alter a government policy. Unlike a judgment, settlement or consent decree, this type of litigation-ending conduct does not bind anyone or in any way alter the relationship between the parties. What a litigant may voluntarily do, it of course may voluntarily undo. Absent some judicial order or judicially-enforceable settlement, it thus is utterly speculative to maintain that one litigant has "prevail[ed]" over the other.

The Court's decisions follow this path. In *Farrar v. Hobby*, 506 U.S. 103 (1992), the Court held that to "qualify as a prevailing party," a plaintiff must satisfy two requirements. "[T]he plaintiff must obtain an enforceable judgment ... or

comparable relief through a consent decree or settlement." *Id.* at 111. And "[w]hatever relief the plaintiff secures must directly benefit him at the time of the judgment or settlement." *Id.* Put another way, a prevailing party must achieve the *end* of a direct benefit through the *means* of an enforceable judgment or other comparable relief. "Only under these circumstances can civil rights litigation effect 'the material alteration of the legal relationship of the parties' and thereby transform the plaintiff into a prevailing party." *Id.* (quoting *Texas Teachers Ass'n v. Garland Sch. Dist.*, 489 U.S. 782, 792-793 (1989)).

The determinate requirements of the *Farrar* test cannot be squared with the free-form "catalyst" theory. A voluntary decision by government to change a policy, like a decision by a plaintiff to dismiss a case, binds no one. Least of all does it do so through a judicially-enforceable decree. Because "[n]o material alteration of the legal relationship between the parties occurs until the plaintiff becomes entitled to enforce a judgment, consent decree, or settlement against the defendant," *id.* at 113, it cannot fairly be said that the plaintiff (or defendant) has prevailed in these circumstances. "[W]ithout a demonstrated legal entitlement, plaintiffs cannot be deemed to have prevailed." *S-1 and S-2*, 6 F.3d at 168 (Wilkinson, J.).

Nor may the "catalyst" theory be salvaged by appealing to earlier Supreme Court precedent. The two-part *Farrar* requirement of (1) a judgment, consent decree, or settlement that (2) alters the legal relationship between the parties builds on precedent; it does not alter that precedent. As to the first requirement, case after case indicates that "liability on the merits and responsibility for fees go hand in hand." *Kentucky v. Graham*, 473 U.S. 159, 165 (1985). *See Hanrahan v. Hampton*, 446 U.S. 754, 758 (1980) (per curiam) (consent decree) ("Congress intended to permit the . . . award of counsel fees only when a party has prevailed on the merits."); *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (settlement)

(prevailing party must "succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit") (quotation omitted); *Hewitt v. Helms*, 482 U.S. 755, 760 (1987) ("Respect for ordinary language requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail.").

As to the second requirement, the Court has warned litigants that it is not enough merely to obtain a favorable judgment to qualify as "prevailing." *See Hewitt*, 482 U.S. at 763 ("a favorable judicial statement of law in the course of litigation that results in judgment against the plaintiff does not suffice to render him a 'prevailing party.'"). Such a judgment "will constitute relief, for purposes of § 1988, if, and only if, it affects the behavior of the defendant toward the plaintiff." *Rhodes v. Stewart*, 488 U.S. 1, 4 (1988) (per curiam). In the end, "the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant." *Texas Teachers Ass'n v. Garland Sch. Dist.*, 489 U.S. 782, 792 (1989). *See id.* at 791-792 ("plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit") (quotation and citation omitted). To our knowledge, the Court has never held that a party may obtain attorney fees where it was not "entitled to enforce a judgment, consent decree, or settlement against the defendant." *Farrar*, 506 U.S. at 113.

Hewitt v. Helms is not to the contrary. There, an appellate court found that the government violated the due process rights of a former prison inmate, Aaron Helms, by using hearsay testimony of an undisclosed informant against him. The court of appeals ordered the district court to enter summary judgment for Helms unless the prison officials could show that they were immune from suit. On remand, Helms pursued only his claim for damages. In particular, Helms'

counsel never sought a declaratory judgment or an expungement order. The district court ultimately entered judgment for the officials on the ground that they were entitled to qualified immunity, and the appellate court affirmed. *See Hewitt*, 482 U.S. 757-759.

Helms nonetheless sought attorney fees, arguing that he had prevailed, for purposes of 42 U.S.C. § 1988, by obtaining a ruling that the government violated his constitutional rights by using hearsay testimony against him. *Id.* at 759. The Court disagreed. As an initial matter, the Court explained, "a favorable judicial statement of law in the course of litigation that results in judgment against the plaintiff does not suffice to render him a 'prevailing party.'" *Id.* at 763.

> Helms obtained no relief. Because of the defendants' official immunity he received no damages award. No injunction or declaratory judgment was entered in his favor. Nor did Helms obtain relief without benefit of a formal judgment—for example, through a consent decree or settlement.

Id. at 760 (citing *Hanrahan*, 446 U.S. at 758-759, and *Maher v. Gagne*, 448 U.S. 122, 129 (1980)).

In the course of rejecting the claim for fees, the Court also observed:

> It is settled law, of course, that relief need not be judicially decreed in order to justify a fee award under § 1988. A lawsuit sometimes produces voluntary action by the defendant that affords the plaintiff all or some of the relief he sought through a judgment—e.g., a monetary settlement *or a change in conduct that redresses the plaintiff's grievances*. When that occurs, the plaintiff is deemed to have prevailed despite the absence of a formal judgment in his favor. *See Maher*, *supra*, at 129.

Hewitt at 760-761 (emphasis added).

Contrary to petitioners' suggestion as well as the suggestion of their *amici*, the italicized language does not address a wholly voluntary change in conduct and certainly does not represent an endorsement of the "catalyst" theory. The citation to *Maher* confirms that this *dictum* refers to monetary and injunctive "settlements." And that of course is all *Maher* says: "The fact that respondent prevailed through a settlement rather than through litigation does not weaken her claim to fees." 448 U.S. at 129. Any ambiguity on this score is removed by the Court's explicit directive to readers of the opinion *not* to draw any conclusions regarding the merits of the "catalyst" theory. In the Court's words: "We need not decide the circumstances, if any, under which [the] 'catalyst' theory could justify a fee award under section 1988." *Hewitt*, 482 U.S. at 763.

Hewitt in the last analysis represents an exceedingly slim reed on which to rest the claim that *Farrar* does not control the resolution of this case. The decision *rejected* a claim for fees, predated *Farrar* by five years, and explicitly declined to address the "catalyst" theory. What matters instead, as *Farrar* makes clear, is (1) whether the litigant is "entitled to enforce a judgment, consent decree, or settlement against the defendant," and (2) whether that order or agreement creates a "material alteration of the legal relationship of the parties." *Farrar*, 506 U.S. at 111, 113. *See also Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 382 (1994) ("If the parties wish to provide for the court's enforcement of a dismissal-producing settlement agreement, they can seek to do so. ... Absent such action, however, enforcement of the settlement agreement is for state courts, unless there is some independent basis for federal jurisdiction.").

III. IN REQUIRING PARTIES TO PREVAIL THROUGH A JUDICIAL ORDER OR A JUDICIALLY-ENFORCEABLE SETTLEMENT, THE STATUTE SETS UP A CLEAR TEST THAT WILL STEM VEXATIOUS COLLATERAL-FEE LITIGATION WHILE STILL PERMITTING DESERVING LITIGANTS TO OBTAIN FEES.

Moving from the sacred to the mundane, this interpretation also makes sense. This construction as a preliminary matter will assuredly stem satellite litigation over attorney-fee awards. As the Court has warned, "[a] request for attorney's fees should not result in a second major litigation." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). The clarity of this two-part test—requiring a judicial order or judicially-enforceable settlement that alters the legal relationship between the parties—promises to advance this objective.

In conspicuous contrast, the elusive state-of-mind and cause-and-effect inquiries compelled by the "catalyst" theory would prompt, and indeed have engendered, all manner of collateral-fee litigation. And that risk is particularly acute when the government alters its conduct through an act of the legislature—as occurred in this case. On what basis will courts determine why the law was passed under those circumstances? Did the change in law flow from the litigation, press coverage, or run-of-the-mill constituent complaints? One trial court's guess frequently will be as good as another's. The Court's bright-line test eliminates this confusion and what often comes with it—unproductive and resource-sapping litigation.

What ultimately makes this case hard are not the terms of the statute, case law, or even (in most cases) the objectives of the fee-shifting statutes. All make clear that litigants are not entitled to fees until they have obtained a judgment or judicially-enforceable settlement that alters the legal relationship between the parties. The difficulty instead is the apparent gap in the statute left by this construction—namely,

the risk that a government litigant could voluntarily dismiss a lawsuit on the eve of an adverse ruling, leaving a civil rights plaintiff with no judgment or alteration in the legal relationship between the parties, just a lot of unpaid fees. But in the end this risk is more perceived than real.

Contrary to petitioner's suggestion, a government defendant may not so readily moot a plaintiff's action. As the Court held just last Term, "[i]t is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (quotation and citation omitted). Defendants who wish to end a legal dispute through voluntary action, *Friends of the Earth* establishes, must satisfy "[t]he heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again." *Id.* (quotation, citation and brackets omitted). Because a defendant that alters its conduct merely to moot a plaintiff's meritorious case is not apt to meet this "heavy burden," plaintiffs will remain free to obtain a judicial determination that alters the legal relationship of the parties.

For like reasons, actions that are "capable of repetition, yet evading review" also will allow some civil rights plaintiffs to proceed to judgment on legal issues even when a case otherwise becomes moot. *See United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 396 (1980). Thus, for example, when "a mentally disabled patient files a lawsuit challenging her confinement in a segregated institution, her postcomplaint transfer to a community-based program will not moot the action." *Friends of the Earth*, 528 U.S. at 215. *See also Norman v. Reed*, 502 U.S. 279, 300 (1992) (action involving challenge to statutory requirements for political party to gain place on the ballot would be considered even though the election had been concluded, as the issue was one capable of repetition yet evading review).

No doubt these avenues of relief do not exhaust every possible scenario in which a government defendant (or civil rights plaintiff) voluntary alters their conduct. But it was never the point of the fee-shifting statutes to make good on every fee claim. Neither section 1988 nor any of these other statutes is "a relief Act for lawyers." *Farrar*, 113 S. Ct. at 578 (O'Connor, J., concurring). "By providing a clear rule for achieving prevailing party status," *S-1 and S-2*, 6 F.3d 160, 171 (Wilkinson, J.), the *Farrar* requirement that a litigant obtain "an enforceable judgment ... or comparable relief through a consent decree or settlement" that alters the legal relationship between the parties, 506 U.S. at 111, necessarily does what all bright lines do—place some cases on one side and some cases on the other side of it. At the same time, this rule shows fidelity to the words of the statute, respects this Court's precedents, and ultimately eliminates a far-more trying and vexatious cycle of litigation.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

JEFFREY S. SUTTON
Counsel of Record
RONALD E. LAYMON
JONES, DAY, REAVIS & POGUE
1900 Huntington Center
41 South High Street
Columbus, OH 43215
(614) 469-3855

ELWOOD LUI
JONES, DAY, REAVIS & POGUE
Suite 4600
555 West Fifth Street
Los Angeles, CA 90013
(213) 489-3939

Counsel for Amici Curiae Los Angeles County and California State Association of Counties

December 2000